

| REPORT DOCUMENTATION PAGE                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                             |                                            | Form Approved<br>OMB No. 0704-0188                                |                                                  |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------|--------------------------------------------|-------------------------------------------------------------------|--------------------------------------------------|
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| 1. AGENCY USE ONLY (Leave blank)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                             | 2. REPORT DATE<br>3.Nov.99                 |                                                                   | 3. REPORT TYPE AND DATES COVERED<br>MAJOR REPORT |
| 4. TITLE AND SUBTITLE<br>THE LONG SLOW STRUGGLE: LEGAL ADVICE AT THE BEGINNING OF THE VIETNAM WAR                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                             |                                            | 5. FUNDING NUMBERS                                                |                                                  |
| 6. AUTHOR(S)<br>MAJ RATTON RONALD R                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                             |                                            |                                                                   |                                                  |
| 7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)<br>UNIVERSITY OF VIRGINIA                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                             |                                            | 8. PERFORMING ORGANIZATION<br>REPORT NUMBER                       |                                                  |
| 9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)<br>THE DEPARTMENT OF THE AIR FORCE<br>AFIT/CIA, BLDG 125<br>2950 P STREET<br>WPAFB OH 45433                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                             |                                            | 10. SPONSORING/MONITORING<br>AGENCY REPORT NUMBER<br><br>FY99-399 |                                                  |
| 11. SUPPLEMENTARY NOTES                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                             |                                            |                                                                   |                                                  |
| 12a. DISTRIBUTION AVAILABILITY STATEMENT<br>Unlimited distribution<br>In Accordance With AFI 35-205/AFIT Sup 1                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                             |                                            | 12b. DISTRIBUTION CODE                                            |                                                  |
| 13. ABSTRACT (Maximum 200 words)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                             |                                            |                                                                   |                                                  |
| <div style="display: flex; justify-content: space-between; align-items: center;"> <div style="text-align: center;"> <b>DISTRIBUTION STATEMENT A</b><br/> Approved for Public Release<br/> Distribution Unlimited </div> <div style="font-size: 2em; font-weight: bold;">19991117 079</div> </div>                                                                                                                                                                                                                                                                                                                                                                                                                          |                                             |                                            |                                                                   |                                                  |
| 14. SUBJECT TERMS                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                             |                                            | 15. NUMBER OF PAGES<br>62                                         |                                                  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                             |                                            | 16. PRICE CODE                                                    |                                                  |
| 17. SECURITY CLASSIFICATION<br>OF REPORT                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | 18. SECURITY CLASSIFICATION<br>OF THIS PAGE | 19. SECURITY CLASSIFICATION<br>OF ABSTRACT | 20. LIMITATION OF<br>ABSTRACT                                     |                                                  |

**Advanced Topics in National Security Law I:  
Legal and Policy Issues of the Indo-China War**

**The Long Slow Struggle: Legal Advice at the  
Beginning of the Vietnam War**

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**21 December 1998**

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written at critical points in the history of the Vietnam War. The first memo was written in November 1961, as the United States was about to introduce the first significant numbers of advisory and support troops to the region. The second memo was written in mid-1964 as the administration contemplated shifting from an advisory to a combat role. When the third memo was written a year later, America was fully committed to a long, slow struggle in the defense of South Vietnam.

## II. Historical Background

The foundation of the Vietnam War was laid in the aftermath of World War II. Prior to that conflict, the French had enjoyed colonial rule over Indochina.<sup>5</sup> During the war, however, Japan occupied Vietnam. Throughout the war, the Japanese faced guerilla opposition, most notably from Viet Minh forces led by the communist leader Ho Chi Minh. After the war, Ho Chi Minh assumed power in the north, but French desires to reassert its colonial power soon interfered with Ho's plans to rule all of Vietnam. Consequently, the first Indochina War began in 1946.

The United States was generally ambivalent about Vietnam at this time. On the one hand, the U.S. wanted to see colonial peoples achieve independence. On the other hand, the U.S. was keen to support France as part of its policy to rebuild Western Europe. The aggressive spread of communism added further impetus for the United States to assist France in some way.<sup>6</sup>

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<sup>5</sup> Indochina consisted of Laos, Cambodia, Cochinchina, Annam, and Tonkin. The last three form Vietnam.

<sup>6</sup> In April 1950, NSC-68 was written. This document, though never formally adopted, influenced Washington policy makers to implement a policy of containment to block the further expansion of Soviet power. NSC-68 also recommended that any conflict be limited where possible to avoid global war. In this regard, it quotes THE FEDERALIST NO. 28: "The means to be employed must be proportioned to the extent

By 1954, the conflict had grown increasingly unpopular in war-weary France. On May 7<sup>th</sup> of that year, the Viet Minh forces defeated the French at Dien Bien Phu. While not a major military setback, it was a crushing blow to French morale and set the stage for the disengagement of the French and direct involvement of United States in Indochina.

The communist victory at Dien Bien Phu came just as the Geneva Conference formally turned its attention from the situation in Korea to Vietnam.<sup>7</sup> During the two and one-half month negotiations, France recognized the government of Vietnam, the precursor to South Vietnam, as a fully independent and sovereign state.<sup>8</sup> The conference ended on July 21<sup>st</sup>. On the day prior, representatives for Commander-in-Chief of French Union Forces in Indochina and the Commander-in-Chief of the People's Army of Vietnam signed the Agreement on the Cessation of Hostilities in Vietnam.<sup>9</sup> On the final day, the participants released an unsigned Final Declaration of the Geneva Conference.<sup>10</sup> These documents, collectively known as the Geneva Accords, ended the first Indochina War.

The agreement to end hostilities established a provisional military demarcation line at the 17<sup>th</sup> parallel, with French Union forces to the south and the People's Army of Vietnam to the north.<sup>11</sup> Furthermore, arms, munitions, and other war material were to be

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of the mischief." In June 1950, North Korea invaded South Korea, further evidencing communist expansionist plans. In July, President Truman signed legislation to aid France.

<sup>7</sup> The parties began discussing Vietnam on May 8, 1954.

<sup>8</sup> This occurred on June 4, 1954. JOHN NORTON MOORE, LAW AND THE INDO-CHINA WAR 414 (1972).

<sup>9</sup> Agreement on the Cessation of Hostilities in Vietnam (July 20, 1954), in XVI FOREIGN RELATIONS OF THE UNITED STATES 1952-1954: THE GENEVA CONFERENCE 1505 (John P. Glennon et al. eds., 1981) [hereinafter Armistice].

<sup>10</sup> The Final Declaration on Indochina (July 21, 1954), in XVI FOREIGN RELATIONS OF THE UNITED STATES 1952-1954: THE GENEVA CONFERENCE 1540 (John P. Glennon et al. eds., 1981) [hereinafter Final Declaration].

<sup>11</sup> Armistice, *supra* note 9, art. 1.

fixed at the level existing in Vietnam in July 1954, with allowance for piece-for-piece replacement.<sup>12</sup> Article 16 prohibited the introduction into Vietnam of any troop reinforcements and article 18 prohibited the establishment of new military bases. Finally, article 19 sought to limit foreign influences by prohibiting the establishment of foreign military bases or military alliances. Also, neither party was to allow the use of its territory for the renewal of aggression.<sup>13</sup>

The key provisions of the unsigned Final Declaration included paragraph six, which states: "[T]he military demarcation line is provisional and should not in any way be interpreted as constituting a political or territorial boundary."<sup>14</sup> Also, paragraph seven called for general elections in July 1956. The two-year delay was designed to "ensure that sufficient progress in the restoration of peace has been made, and that all the necessary conditions obtain for free expression of the national will . . . ."<sup>15</sup>

Unfortunately, the Accords were exceptionally vague on almost all key points. They also suffered from South Vietnam's outright rejection of the concept of partition and elections without United Nations supervision. The United States issued a unilateral declaration stating that it would refrain from any threat or use of force to disturb the agreements and that it would "view any renewal of the aggression in violation of the aforesaid agreements with grave concern and as seriously threatening international peace and security."<sup>16</sup>

With the withdrawal of the French Expeditionary Corps, South Vietnam was defenseless except for the forces it could train and equip with U.S. assistance. Between

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<sup>12</sup> Armistice, *supra* note 9, art 17.

<sup>13</sup> Armistice, *supra* note 9, art. 19.

<sup>14</sup> Final Declaration, *supra* note 10, para. 6.

<sup>15</sup> Final Declaration, *supra* note 10, para. 7.

1954 and 1961, the United States sought to fill the vacuum created by the French withdrawal in order to check communist expansion in South Vietnam. This policy reflected the dominant belief that if Vietnam fell, so too would other Asian states. On February 12, 1955, the U.S. assumed full responsibility from the French for training Vietnamese forces.<sup>17</sup>

From 1956 to 1959, Ho Chi Minh was concerned mostly with consolidating his power in the north. Although he had left armed cadres in the south in contravention of the Geneva Accords, the level of guerilla activity was fairly low.<sup>18</sup> This changed dramatically beginning in 1959. After meeting in Hanoi on May 13, 1959, the Central Committee of the North Vietnamese Communist Party publicly announced its intention to smash the Diem government. Subsequently, North Vietnam significantly increased its infiltration, subversion, assassination, and sabotage, cloaking its aggression as an insurgency.<sup>19</sup> From 1959 to 1961, North Vietnam infiltrated some 10,000 men into the south.<sup>20</sup> In 1960, the death toll was 1,400 local government officials and 2,200 military personnel, with another 700 persons kidnapped.<sup>21</sup> In 1961, the Vietnamese communist forces averaged 650 violent incidents per month.<sup>22</sup>

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<sup>16</sup> I THE PENTAGON PAPERS: THE DEFENSE DEPARTMENT HISTORY OF UNITED STATES DECISIONMAKING ON VIETNAM (THE SENATOR GRAVEL EDITION) 162 (1971) [hereinafter I PENTAGON PAPERS].

<sup>17</sup> *Id.* at 182. See also WILLIAM W. MOMYER, AIR POWER IN THREE WARS 247 (1978) (discussing the agreement between General Paul Ely, Commanding General of French forces in Indochina, and General J. Lawton Collins, President Eisenhower's special envoy to Saigon).

<sup>18</sup> It was not, however, *de minimis*. For example, more than 1,000 civilians were murdered or kidnapped from 1957 to 1959.

<sup>19</sup> I FOREIGN RELATIONS OF THE UNITED STATES 1961-1963: VIETNAM 1961 93 (John P. Glennon et al. eds., 1988) [hereinafter VIETNAM 1961].

<sup>20</sup> 12 DIGEST OF INTERNATIONAL LAW 114 (Marjorie M. Whiteman ed., 1971) [hereinafter WHITEMAN]. An additional 13,000 men would be infiltrated in 1962. By the end of 1964, North Vietnam had infiltrated over 40,000 men. *Id.*

<sup>21</sup> *Id.* at 113.

<sup>22</sup> *Id.*

By the end of 1961, the situation was becoming critical in South Vietnam. In January of that year, Soviet leader Nikita Krushchev gave a speech indicating support for wars of national liberation. This underscored the urgency of the United States' policy of containment and shifted the focus of senior administration officials to counterinsurgency and limited war.<sup>23</sup> Indeed, President Kennedy's military advisor, General Maxwell Taylor, had long been a proponent of low scale, non-nuclear, limited war. From October 15 to November 3, 1961, General Taylor visited Vietnam to get a first-hand look at the situation.<sup>24</sup>

The Taylor Report was submitted to President Kennedy on November 3, 1961.<sup>25</sup> Alluding to a communist declaration of irregular war, the report recommended a sharp increase in aid to the struggling Saigon government. Taylor also recommended the deployment of U.S. troops for logistical support and military training. Thus began the increase from a few hundred advisors to over 16,000 by the time of the Kennedy assassination two years later.

Most of these advisors were U.S. Army Special Forces and other soldiers. The United States Air Force pulled World War II propeller aircraft, primarily the T-28 and B-26, out of storage. In April 1961, the "Air Commando" or JUNGLE JIM unit was formed at Eglin Air Force Base, Florida. A detachment of this unit, code-named FARM GATE, deployed to South Vietnam on October 11, 1961. General Momyer, who served

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<sup>23</sup> MOMYER, *supra* note 17, at 9. Strangely, U.S. leaders seemed to lose sight of the fact that the Viet Minh forces had defeated the French using conventional forces in a pitched battle. *Id.* at 10. 1961 was a turbulent year by any measure. Other significant events included the Bay of Pigs fiasco, construction of the Berlin Wall, difficulties in Laos, the Congo Civil War, the Algerian Civil War, and the resumption of nuclear testing by the Soviet Union.

<sup>24</sup> See generally VIETNAM 1961, *supra* note 19, at 380-476.

<sup>25</sup> *Id.* at 477-532.



on the Air Staff from 1961 to 1964 and as Commander, Seventh Air Force in Vietnam from 1966 to 1968, writes:

The mission of this unit from the outset was ambiguous. The aircraft had VNAF markings, and the unit was not authorized to conduct combat missions without a Vietnamese crew-member. Even then, the missions were training missions although combat weapons were delivered. The missions were designed to train Vietnamese pilots to bomb and shoot, and since there were real targets, the situation provided maximum training.<sup>26</sup>

As the war progressed, USAF crews flew combat missions in response to emergency requests with increasing frequency and defense planners sought to find ways to remove restrictions on its operations.<sup>27</sup>

The United States also initiated a defoliation program to combat ambushes along major roadways<sup>28</sup> and supported South Vietnamese efforts to pacify the countryside with its Strategic Hamlet Program<sup>29</sup> and crop destruction.<sup>30</sup> Even though our forces were sent to teach, it was inevitable that they would become "involved in the fighting at their isolated camps deep in territory dominated by the Viet Cong."<sup>31</sup> Vietnam was to be a "laboratory for the development of organizations and procedures for the conduct of sub-limited war."<sup>32</sup> Nonetheless, the administration continued to assert that "[w]e have not sent combat troops in the generally understood sense of the word."<sup>33</sup>

<sup>26</sup> MOMYER, *supra* note 17, at 253.

<sup>27</sup> *Id.* at 253-54.

<sup>28</sup> II FOREIGN RELATIONS OF THE UNITED STATES 1961-1963: VIETNAM 1962 144 (John P. Glennon et al. eds., 1990) [hereinafter VIETNAM 1962].

<sup>29</sup> See generally II THE PENTAGON PAPERS: THE DEFENSE DEPARTMENT HISTORY OF UNITED STATES DECISIONMAKING ON VIETNAM (THE SENATOR GRAVEL EDITION) 128-158 (1971) [hereinafter II PENTAGON PAPERS].

<sup>30</sup> VIETNAM 1962, *supra* note 28, at 584.

<sup>31</sup> MOMYER, *supra* note 17, at 10.

<sup>32</sup> *Id.* (quoting Secretary of Defense McNamara).

<sup>33</sup> VIETNAM 1962, *supra* note 28, at 144, 225 (quoting President Kennedy in a February 14, 1962 press conference). See also H.R. MCMASTER, DERELICTION OF DUTY 37 (1997) (stating that "[a]lthough U.S. advisers were fighting with South Vietnamese units and U.S. pilots were flying combat missions in South

### III. Analysis of the 1961 Legal Advice

#### a. The Department of State Legal Advisor

In 1961, the State Department Legal Advisor was Abram J. Chayes. Chayes was, and is, a noted legal scholar, graduating number one in his class at Harvard Law School in 1949.<sup>34</sup> Prior to coming to the State Department, he had clerked for a Supreme Court justice, practiced law in a private firm, and taught at Harvard Law School.<sup>35</sup> His practice and teaching had been primarily in the domestic arena.<sup>36</sup> After working on President Kennedy's election campaign, however, he took the international law position in the State Department.<sup>37</sup>

In a memorandum dated November 16, 1961, Chayes, sought to provide guidance to the Secretary of State on future United States' involvement in Vietnam.<sup>38</sup> The memorandum was written in direct response to General Maxwell Taylor's Report on Vietnam.<sup>39</sup> That report recommended immediately sending additional U.S. military personnel and equipment South Vietnam. The purpose of this augmentation was to provide a U.S. military presence to show "the seriousness of the U.S. intent to resist a Communist takeover."<sup>40</sup> The U.S. would assist South Vietnam by increasing airlift

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Vietnam, Kennedy denied that Americans were involved in combat, and Vietnam attracted little public or congressional attention").

<sup>34</sup> *Living History Interview with Abram Chayes*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 459, 481 (1997). Today, Chayes is seen as the founder of the International Legal Process School, which competes with the Policy Science or New Haven School of International Law pioneered by Myres McDougal and Harold Lasswell. Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 YALE L. J. 2599, 2618 (1997). He is well known for his representation of Nicaragua against the United States before the International Court of Justice and for opposing the Grenada Invasion.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> VIETNAM 1961, *supra* note 19, at 629.

<sup>39</sup> See *supra* notes 24-33 and accompanying text.

<sup>40</sup> VIETNAM 1961, *supra* note 19, at 481.

operations, expanding intelligence operations, implementing naval surveillance activities, and training and equipping South Vietnamese military and civil guard elements.<sup>41</sup> The memorandum goes further, however, and also discusses "whether additional United States forces should be introduced even to the extent of a Korea-type operation and whether we may eventually have to attack the source of guerilla aggression in North Vietnam . . . ."<sup>42</sup>

Until 1961, U.S. military presence in Vietnam had remained within the limits of Geneva Accords.<sup>43</sup> By April of that year, however, the United States was beginning to seriously reconsider its continued support of and adherence to the Geneva Accords since others were openly violating them.<sup>44</sup> The State Department, however, was reluctant to fully disavow the Accords. In a prior memo, Chayes opined that the whole structure of the Indochina partition rested on the Accords.<sup>45</sup> Furthermore, the United States wanted to try to benefit by holding other parties to the terms of the Accords.<sup>46</sup>

#### b. Chayes' Cover Letter

In all likelihood, Chayes did not draft the actual legal memorandum, though as the Legal Advisor he would have coordinated on and approved the final product.<sup>47</sup> He did,

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<sup>41</sup> *Id.* at 480-81.

<sup>42</sup> VIETNAM 1961, *supra* note 19, at 631.

<sup>43</sup> II PENTAGON PAPERS, *supra* note 29, at 438.

<sup>44</sup> VIETNAM 1961, *supra* note 19, at 71, 75.

<sup>45</sup> *Id.* at 117. This legal memo has not been found, but the Secretary of State, George Ball referred to it in a meeting of the Presidential Task Force in May 1961. *Id.* at 117 n.8.

<sup>46</sup> *Id.* at 121.

<sup>47</sup> Although we don't know who actually drafted the memorandum, Chayes' deputy during this time was Leonard Meeker. Interestingly, it was Meeker who provided the legal advice to the Administration at the outset of the Cuban Missile Crisis, since Chayes was out of the country. Chayes fully endorsed that advice, which favored the use of quarantine over invasion. That choice was predicated on the conclusion that placing missiles in Cuba did not amount to armed attack as required by Article 51 of the U.N. Charter, thus the right of self-defense was not triggered. Chayes admits that quarantine was the same as blockade, which he considered an act of war. However, the Administration chose to use the term quarantine to convey to

however, include a cover letter to the Secretary of State that provides an interesting glimpse into Administration feelings on the situation in Vietnam. Pointedly, Chayes viewed the deterioration of the situation in Vietnam as a political problem rather than a military one. In his view, the problem in Vietnam was not primarily one of aggression from North Vietnam, but the inability of an unpopular regime to deal with an internal insurrection. Furthermore, Chayes was committed to "the procedures and institutions for peaceful settlement of international problems" as a necessary condition of international rule of law.<sup>48</sup> Consequently, Chayes did not support deeper U.S. military involvement in South Vietnam. Instead, he determined that the U.S. must "seek to internationalize the problem with a view to a negotiated settlement or a United Nations solution."<sup>49</sup>

History has shown Chayes' two premises to be flawed. First, the problem in South Vietnam was always due primarily to aggression from North Vietnam. Indeed, even by the time Chayes wrote his memo, the conflict had taken on many of the characteristics of a conventional, vice guerilla, war, although senior DOD planners did not generally recognize this change.<sup>50</sup> Second, Chayes' optimistic view of negotiated settlement evidences a mistake common to international lawyers. Chayes analyzed the conflict using a civil rather than a criminal law paradigm. Rather than seeing the Vietnam War as a civil dispute between two negotiating parties, he should have viewed it

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the Soviet Union that the U.S. regarded the action as part of the negotiating process rather than an act of war. *Living History*, *supra* note 34, at 468-70. Meeker would later draft a comprehensive legal justification for U.S. actions in Vietnam in a March 6, 1966 memorandum that was released publicly. *The Legality of United States Participation in the Defense of Vietnam*, 60 AM. J. INT'L L. 565 (1966).

<sup>48</sup> VIETNAM 1961, *supra* note 19, at 630.

<sup>49</sup> *Id.* at 631. He does make one interesting alternative suggestion. He recommends that if the U.S. is unable to negotiate a settlement with North Vietnam, it should "seek to establish in the United Nations the facts of foreign intervention in Viet-Nam, and to enlist the United Nations' assistance in protecting the independence and integrity of Viet-Nam." *Id.* In essence, he was suggesting that the U.S. "make its case" before the U.N. as it did during the Cuban Missile Crisis.

<sup>50</sup> MOMYER, *supra* note 17, at 10.

as a problem of a criminal state seeking to impose its will on its neighbor. Had he used this criminal law paradigm, he might have seen the potential utility of employing military force to halt and deter North Vietnam's aggression.

The State Department legal memo itself was divided into two main sections. The first part dealt with the introduction of additional support troops and materiel in light of the Geneva Accords.<sup>51</sup> The second half of the memorandum addressed other potential international legal barriers to U.S. combat action.

### c. The Geneva Accords

With respect to the Geneva Accords, Chayes asserts three bases for finding that South Vietnam was bound by the agreement.<sup>52</sup> First, he states that even though the South Vietnamese representative at the conference refused to sign the Accords and in fact protested certain provisions, it was signed by the French on behalf of the French Union Forces. Since the State of Vietnam was part of the French Union in 1954, it was bound by that signature. Second, Chayes asserts that South Vietnam was bound by the Accords as the Successor State to France. Finally, Chayes relied on policy reasons for treating South Vietnam as bound to the Accords. Specifically, he was concerned that if South Vietnam was not bound, then neither they nor the United States would have a legal basis

<sup>51</sup> See *supra* text accompanying notes 9-16.

<sup>52</sup> VIETNAM 196, *supra* note 19, at 632. The assumption that Saigon, and even the U.S., was bound by the Accords permeated the thinking of other government officials as well. For example, a May 4, 1961 memo from Robert W. Komer of the National Security Council Staff to the National Security Advisor, McGeorge Bundy, states that "[o]ur sending any troops to Vietnam now or later would be violation of Geneva Accords, to which Saigon is a party." The memo goes on to question whether "Pentagon contingency planning . . . is geared too much to sensible military objectives . . . . The purpose of sending forces is *not* to fight guerillas. It would be to establish a U.S. 'presence.'" *Id.* at 123-24 (*italics in original*). See also *id.* at 377 (memo listing possible courses of action stating that "this proposal, if implemented, would be in violation of the Geneva Accord").

for demanding compliance by the Viet Minh with its obligations in the agreement, such as respect for the demarcation line and the cease-fire.

Concerning the United States, the memorandum clearly finds that the United States was not bound by the Accords since the United States did not become a party. On the other hand, U.S. policy for the preceding seven years had been to adhere to the troop and equipment limitations in the Accords. This was becoming increasingly difficult to follow.<sup>53</sup> Also, Chayes points out that the United States, while not legally bound by the Accords, did issue a unilateral declaration stating that it would refrain from the threat or use of force to disturb the Accords. The U.S. also declared that it would view any renewal of aggression in violation of the Accords with grave concern and as seriously threatening international peace and security.

After finding that South Vietnam was obliged to adhere to the Accords, Chayes evaluated Taylor's proposed actions in light of the agreement's prohibitions. In general, the Accords prohibited introducing foreign troop reinforcements, additional military personnel, and increased amounts of war material into Vietnam.<sup>54</sup>

Unsurprisingly, Chayes finds that implementing the recommendations of the Taylor Report would be a *prima facie* violation of the Accords by South Vietnam. As a non-party, the United States would not violate the Accords *per se*, but would be guilty of "aiding and abetting" South Vietnam's violation. Despite this, the United States' action would not be inconsistent with the unilateral declaration, since it would not constitute the threat or use of force to upset the Accords.

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<sup>53</sup> *Id.* at 718.

<sup>54</sup> See *supra* text accompanying notes 9-16.

Having established a *prima facie* case against South Vietnam (with the United States as an accessory), Chayes then examines the general principles of international law governing treaties to justify the proposed actions. In particular, Chayes states that under international law, a material breach of a treaty by one party entitles the other either to suspend the operation of the entire agreement or at least to withhold compliance with an equivalent, corresponding or related provision until resumption of observance by the other party.<sup>55</sup>

Armed with this defense, Chayes opines that introducing troops and material into South Vietnam was legally justified under the circumstances. Among the relevant facts, Chayes notes that "[t]he Viet Minh have violated the Geneva Accords by directing, assisting and engaging in active hostilities in South Viet-Nam and presumably by illegal introduction into North Viet-Nam of military personnel and war materials."<sup>56</sup>

Chayes recommends withholding compliance with specific provisions related to the breaches rather than totally suspending the agreement so as to retain the ability to assert the continuing force of other obligations undertaken by the Viet-Minh, especially

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<sup>55</sup> This statement of the law was later codified in the Vienna Convention on the Law of Treaties. Article 60 states in part:

2. A material breach of a multilateral treaty by one of the parties entitles:
  - (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
    - (i) in the relations between themselves and the defaulting State, or
    - (ii) as between all the parties;
  - (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
  - (c) any party other than the defaulting State to invoke the Breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.
3. A material breach of a treaty, for the purposes of this article, consists in:
  - (a) a repudiation of the treaty not sanctioned by the present Convention; or
  - (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, 8 I.L.M. 679.

<sup>56</sup> VIETNAM 1961, *supra* note 19, at 633.

recognition of the demarcation line. Chayes cautions, however, that this course "imposes upon us some obligation to keep our response appropriately related to the infractions of the other side."<sup>57</sup>

Despite finding this justification, Chayes is still concerned with the impact of the inevitable communist claims that South Vietnam and the United States would be violating the Accords. In order to dampen the persuasive force of such claims, he suggests that U.S. actions be "cast in the form of assistance and training to police and constabulary forces rather than the introduction and training of regular troops . . . ."<sup>58</sup>

#### d. Analysis of the Legal Advice Concerning the Geneva Accords

A brief review of State Department documents during this time frame indicate that the U.S. felt increasingly hemmed in by its policy of observing the Geneva Accords.<sup>59</sup> Chayes provided a narrow legal justification to exceed the troop and material limitations of the Accords. His rationale, that South Vietnam was permitted under international law to respond in kind to North Vietnam's non-observance of the Accords, was soon picked up by senior officials arguing in favor of increased U.S. support.<sup>60</sup>

<sup>57</sup> *Id.* One weakness with this approach is that it would hand the military initiative to Hanoi.

<sup>58</sup> VIETNAM 1961, *supra* note 19, at 633-34.

<sup>59</sup> See *supra* note 52.

<sup>60</sup> See, e.g., VIETNAM 1962, *supra* note 28, at 4-5 (memo discussing public affairs program). The U.S. also considered arguing this case before the International Control Commission (ICC) established to monitor implementation of the Geneva Accords. *Id.* at 117 (telegram from State Department to Embassy in Vietnam outlining proposed response to ICC regarding build-up of U.S. troops and material); *Id.* at 184-85 (draft communication to ICC). However, it soon became clear that the Canadian Counselor on the ICC did not agree that a breach by one side justified non-observance by the other. *Id.* at 253-54. Consequently, the United States pursued three different approaches with the ICC. First, it argued that the Geneva Accords meant to freeze the military balance and that the introduction of U.S. non-combatants did not violate the Accords. *Id.* at 274-75. Second, the United States sought to reconcile additional military measures with the Accords by asserting that South Vietnam was merely returning to the status that existed before premature withdrawal of French Union Forces. *Id.* at 401-03. Finally, the United States shipped material into the country covertly. It appears the U.S. adopted the latter policy in part because notifying the ICC of the military build-up would be seen as "self-conviction." *Id.* at 456. Of course, by keeping U.S. actions



Nonetheless, Chayes could have gone further than he did. In particular, he should have found that South Vietnam was not bound by the Accords.

At the time of the signing of the Geneva Accords, South Vietnam was already a separate sovereign entity. This is evidenced by the fact that on June 4, 1954, France had granted the State of Vietnam, the predecessor to South Vietnam, its independence.<sup>61</sup> Indeed, prior to the Geneva settlement, approximately thirty governments had recognized South Vietnam.<sup>62</sup> Furthermore, a French delegate to the conference remarked that the government of the State of Vietnam was independent and solely competent to commit that state.<sup>63</sup> Moreover, South Vietnam's mere presence at the conference as an entity separate from France indicates that it could not be bound by France's signature on the Accords.<sup>64</sup>

Additionally, it appears that South Vietnam satisfied the customary international law test for statehood in 1954. That test, which is substantially the same today,<sup>65</sup> includes the requirement that the entity possess a defined territory and population.<sup>66</sup> Also, the entity must be eligible for recognition and have the capacity to engage in foreign

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secret, it appeared that it was engaged in unlawful conduct. The U.S. made this same mistake throughout the war and again during its intervention in Central America during the Reagan Administration.

<sup>61</sup> MOORE, *supra* note 8, at 414.

<sup>62</sup> *Id.* at 408.

<sup>63</sup> *Id.* at 414-15.

<sup>64</sup> *Id.* at 415.

<sup>65</sup> The modern formulation is as follows: "Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1995).

<sup>66</sup> When the Chayes memorandum was written, the Restatement was still in draft form. The 1960 draft combined statehood and recognition, and required an entity to have a defined territory and population, to be eligible for recognition, and to show a reasonable and substantial promise of being able to establish and maintain its independence as a legal personality under international law. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 6 (Tentative Draft No. 4, April 27, 1960). A later draft changed the last requirement to a capacity to engage in foreign relations. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 (Proposed Final Draft, May 3, 1962).

relations. South Vietnam met all of these criteria. Thus, it was a separate sovereign at the time France signed the Geneva Agreement, and was not bound by its provisions.

Finally, with respect to the United States' unilateral declaration, Chayes fails to mention that this wasn't legally binding anyway. Indeed, the only U.S. (and South Vietnamese) obligation at that point was to avoid any use of force inconsistent with the U.N. Charter.

**e. Other International Law Barriers**

Next, Chayes examines whether any other principle of international law barred U.S. military action. At the outset, Chayes states that the United States was permitted under international law and the U.N. Charter to send forces to South Vietnam at their invitation in order to assist them in quelling "insurgent activities having substantial external support, inspiration or direction."<sup>67</sup> The key issue, however, was whether those forces could be employed beyond the borders of South Vietnam. Here, Chayes takes a curious approach.

First, Chayes examines the legality of immediate cross-border attacks against enemy sanctuaries. In this regard, Chayes states:

It would seem justifiable under international law principles relating to hot pursuit to follow the enemy across the border and attempt to destroy his bases of operations adjacent to the border. Such operations would have to be appropriately related to the act provoking them, proportionate in their effects and limited to action necessary to obtain relief.<sup>68</sup>

Second, with respect to strategic attacks against targets deep inside North Vietnam, Chayes concludes that "[i]n the absence of overt aggression by means of armed

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<sup>67</sup> VIETNAM 1961, *supra* note 19, at 634.

attack against South Viet-Nam, such action would go beyond permissible self-defense under general international law and would be contrary to the United Nations Charter.”<sup>69</sup> Chayes concludes this for the following reason. Such an attack could only be taken if the right of individual or collective self-defense was triggered. Chayes states that this right could only be invoked under Article 51 of the U.N. Charter in the event of an “armed attack.” He further opines that the term “armed attack” is “generally understood as a direct external attack upon one country by the armed forces of another such as the German invasion of Poland in 1939 or the North Korean attack on South Korea in 1950.”<sup>70</sup> Furthermore, it must be a swift action that requires immediate measures to ward it off.<sup>71</sup> Consequently, in light of Article 2(4) of the U.N. Charter, “[i]n cases of aggression that fall short of armed attack . . . it would not be consistent with the purposes of the United Nations for the United States . . . to proceed to the use of armed force to defeat acts which it considers aggressive.”<sup>72</sup>

**f. Analysis of the Legal Advice Concerning Other Barriers to U.S. Action**

**1. Civil War**

The second half of the Chayes memorandum is sub-divided into two sections: “*General Intervention*” and “*Retaliatory Attacks*.” In the former, Chayes notes that the United States is permitted to introduce troops into South Vietnam at that government’s request to help quell insurgent activities. It is interesting to note that in reaching this conclusion, Chayes seems to imply that there was a civil war in Vietnam and that the

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 635.

<sup>71</sup> *Id.*

U.S. could aid one side in such a struggle. On the other hand, for purposes of evaluating what he terms "retaliatory attacks," he takes for granted that South and North Vietnam are separate international entities. Thus, in this instance, he does not raise the "civil war" argument popular in some academic circles.<sup>73</sup>

This latter stance was appropriate, since the use of coercive force as a modality of change in the modern world should not depend on legal niceties of statehood recognition. From 1954, North and South Vietnam had been separate *de facto*, if not *de jure*, entities.<sup>74</sup> They had separate governments, one on each side of the Cold War ideological fence. Furthermore, the temporary demarcation line at the 17<sup>th</sup> parallel dictated by the Geneva Accords was, if nothing else, intended to label as unlawful any use of force across that boundary. Thus, as Moore points out, "[t]o get comfort from the Accords for the proposition that force by the D.R.V. against the R.V.N. is not unlawful is to stand the agreements on their head."<sup>75</sup>

## 2. The Right of Hot Pursuit

It is unclear at first blush why Chayes subdivided "retaliatory attacks" between those directed at border sanctuaries in Laos and North Vietnam and those directed at targets further in North Vietnam. Closer examination reveals that implicit in Chayes approach was a legal distinction between covert and overt aggression. Action in response to the former was limited, according to Chayes, to "hot pursuit." Thus, so long as the enemy limited its actions to supplying forces in country (which Chayes presumably assumed would be wholly indigenous) or to small scale, guerilla attacks, South Vietnam

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<sup>72</sup> *Id.*

<sup>73</sup> MOORE, *supra* note 8, at 359-66.

<sup>74</sup> *Id.* at 361-62.

<sup>75</sup> *Id.* at 363.

could not invoke the right of self-defense. It could only respond when it caught enemy forces in its country. Once it did, it could chase them back to their post or encampment, so long as they were not "deep inside" North Vietnam, and then destroy their bases of operations.

The right of hot pursuit had been vaguely recognized in United States history. It dates to May of 1836, when U.S. forces pursued "marauding Indians who had crossed into U.S. territory from Mexico and there committed acts of murder, arson and plunder before fleeing into Mexican territory."<sup>76</sup> Early in the twentieth century, Hackworth describes how the United States felt justified in pursuing lawless bands of armed men led by Pancho Villa in raids across the Mexican border.<sup>77</sup> This justification was based on the theory that the arrangement was reciprocal, that the Mexican government did not sponsor the bandits, and that the Mexican government was simply unable to control these armed groups.<sup>78</sup>

This right is distinguished from the right of hot pursuit at sea or in the air. In those cases, the pursuit must end when the ship or aircraft enters the territory of another state.<sup>79</sup> In contrast, the right of hot pursuit on land involves the violation of another

<sup>76</sup> WHITEMAN, *supra* note 20, at 75.

<sup>77</sup> II DIGEST OF INTERNATIONAL LAW 282-334 (Green Haywood Hackworth ed., 1941) [hereinafter HACKWORTH].

<sup>78</sup> Bowett writes:

There are cases of the pursuit of bodies acting without the authority or support of the state whose territory is invaded in hot pursuit, and they presuppose the inadequacy of the territorial state's own measures of prevention. The resultant derogation from the state's territorial sovereignty arises directly from that state's inability to secure to its neighbor respect for its territorial sovereignty.

D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 39 (1958).

<sup>79</sup> WHITEMAN, *supra* note 20, at 76. See also Richard J. Erickson, *Use of Armed Force Abroad: An Operational Law Checklist*, THE REPORTER, June 1988, at 3, 6-7. Erickson lists several conditions that must be satisfied for hot pursuit to be a legitimate use of military force. For example, the hot pursuit must begin within the territory of the pursuing state and continue out onto the high seas or in the air above. The pursuing state must have good reason to believe that the ship or aircraft has violated its laws or regulations

state's territorial sovereignty. This response is justified because the neighboring state has allowed its territory to be misused to the detriment of the security of the other state.<sup>80</sup>

There is some debate as to whether this right stands on its own or whether it is grounded in the principle of self-defense.<sup>81</sup> The argument for the former is that "in many cases the action of the pursuing state is distinctly punitive in character, and, therefore, since it goes beyond the necessities of protection, is more properly described as reprisals."<sup>82</sup> This would seem untenable under modern international law. Indeed, Bowett concluded in 1958 that "the right of hot pursuit, whatever its conditions in the past, must under present-day international law be subject to those same limitations and conditions which govern any exercise of the right of self-defence."<sup>83</sup>

Thus, the right of hot pursuit has been effectively collapsed into the right of self-defense. While this is implicit in Chayes' analysis, he still treats hot pursuit as a separate basis for action, perhaps because he concluded that the attackers were "acting without the authority or support" of North Vietnam. In effect, he adopts the concept of hot pursuit in order to justify destroying enemy bases immediately adjacent to the border. He avoids calling these actions self-defense, however, thereby limiting the U.S. military response.

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while within its territory. Furthermore, the pursuit must be continuous, beginning after a signal to stop has been given, and ceasing when the ship or aircraft enters the territory of another state.

<sup>80</sup> WHITEMAN, *supra* note 20, at 75.

<sup>81</sup> HACKWORTH, *supra* note 77, at 289 (grounding the cross-border action in self-defense).

<sup>82</sup> BOWETT, *supra* note 78, at 40.

<sup>83</sup> *Id.* at 41. Tellingly, Bowett entitles this section of his book "The So-Called Right of Hot Pursuit." He also notes that while the reasoning appears in principle unobjectionable, all of the incursions involve states with significant power differentials. *Id.* at 40. Perhaps Hot Pursuit on Land would fall into that category of obsolete 19<sup>th</sup> Century international law doctrines described by McDougal and Feliciano as reflecting the desire to localize and minimize coercion and violence by permitting quick settlement through superior strength. MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM PUBLIC ORDER 137-38 (1961). It certainly appears to have been an obsolete doctrine at the time of Chayes memo. Neither Stone nor Greenspan mention it in their treatises. JULIUS STONE, LEGAL CONTROL OF INTERNATIONAL CONFLICT (1959); MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE (1959).

By limiting the response to the territory of South Vietnam or border areas during hot pursuit, he leaves the military advantage with the attacker.

Pointedly, Chayes states that these guerilla attacks were not "armed attacks" though surely they were attacks using arms. As noted above, Chayes believed that the term "armed attack" as used in the Charter means an overt attack by conventional armies such as the German invasion of Poland. Furthermore, it must be a swift blitzkrieg type attack. "Indirect aggression" was excluded from this definition. In the case of acts falling short of the "armed attack" threshold, the aggrieved state was required to absorb the impact and bring the matter to the attention of the United Nations.

#### **g. A Better Approach**

The difficulty with the second part of Chayes memorandum is that he allowed the scope of possible military action drive his conclusions rather than deducing the permissible scope of action from the norms of international law. The correct approach would have been to first determine whether there was a basis in international law for U.S. military intervention in Indochina. In general, the U.N. Charter requires nations to resolve their international disputes peacefully and refrain from the use of force as a modality of change.<sup>84</sup> All use of force, however, is not proscribed by Article 2(4), only the aggressive use of force. The lawful use of force falls generally into one of four broad categories.<sup>85</sup>

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<sup>84</sup> The U.N. Charter states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2, para. 4.

<sup>85</sup> NATIONAL SECURITY LAW 86 (John Norton Moore et al. eds., 1990).

First, states may use force pursuant to a U.N. Security Council decision under Chapter VII of the U.N. Charter. Chapter VII of the U.N. Charter is entitled "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." Article 42 states that the Security Council "may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." Examples of collective actions authorized by the Security Council include the Korean War and the Persian Gulf War.

Second, Chapter VIII of the U.N. Charter authorizes the creation of various regional organizations "for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action . . . ."<sup>86</sup> Article 53 permits enforcement actions to be carried out by a regional organization if sanctioned by the U.N. Security Council.<sup>87</sup>

Third, some uses of force may be permitted if they fall below the threshold of Article 2(4) of the U.N. Charter. Any such use of force must therefore not threaten the territorial integrity or political independence of the other state, or be in any manner inconsistent with the purposes of the U.N.

Finally, states may take actions in individual or collective self-defense pursuant to Article 51 of the U.N. Charter and customary international law. In the case of Vietnam, the Security Council had not used its authority to sanction the use of force. Indeed, given the ideological climate of the time, such authorization would not have been forthcoming

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<sup>86</sup> U.N. CHARTER art. 52.

<sup>87</sup> U.N. CHARTER art. 53 ("The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.").



had the U.S. requested it. Thus, we must look to the last broad category of the permissible use of force: the right of a state to act in individual or collective defense.

The first inquiry in this regard is to define the right of self-defense. The appropriate starting point would be Article 51 of the U.N. Charter, which states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>88</sup>

As an initial matter, it is important to note that the right of self-defense emanates either from customary international law or Article 51 of the U.N. Charter. Some scholars contend that Article 51 merely reaffirmed the traditional right. Others, however, advocate a "restrictive interpretation" of Article 51.<sup>89</sup> Principally, however, this restrictive interpretation eliminates the traditional right of anticipatory self-defense, and thus is not implicated by the situation in Vietnam.<sup>90</sup> Still others use a restrictive interpretation to exclude responses to covert aggression. Chayes apparently fell into this category.<sup>91</sup> Finally, even if one accepts the premise that Article 51 states a different,

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<sup>88</sup> U.N. CHARTER art. 51.

<sup>89</sup> STONE, *supra* note 83, at 244; GREENSPAN, *supra* note 83, at 27.

<sup>90</sup> MOORE, *supra* note 8, at 368 n.18.

<sup>91</sup> Later writings by Chayes would seem to confirm this assessment and place Chayes squarely in the minimalist legal tradition. For example, in *NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS*, Chayes opines that states that do not comply with treaty norms do so not because of willful disobedience, but because of deficiencies in the treaty regime. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 15 (1995). Concluding that enforcement mechanisms are not useful, he proposes a managerial strategy of discourse and persuasion to induce compliance. *Id.* at 109-11. Thus, he adopts a civil law model for dispute resolution, assuming that all parties will act in good faith and seek settlement to avoid any loss of reputation. See also John Norton Moore, *The Secret War in Central America and the Future of the World Order*, 80 AM. J. INT'L L. 43, 107 n.250 (1986) (attacking Chayes' anemic right to

more restrictive right of self-defense, one must decide whether it was meant to displace the broader customary right.<sup>92</sup> If it doesn't, then the broader customary right is still viable.

As noted above, Chayes seems to fall into the category of international lawyers who believe that Article 51 displaced the customary right of self-defense with a more restrictive interpretation. This was inappropriate for several reasons.

First, the plain language of the article is that the inherent right of self-defense is triggered by an "armed attack." The phrase is not elsewhere defined as a term of art, nor is it modified by the word "direct." As one diplomat stated,

Article 51 does not speak of a direct armed attack. It speaks of armed attack. It wishes to cover all cases of attack, direct or indirect, so long as it is an armed attack. Is there any difference from the point of view of the effects between direct armed attack or indirect armed attack if both of them are armed and if both of them are designed to menace the independence of a country?<sup>93</sup>

Thus, the plain meaning of Article 51 encompasses covert insurgency as well as overt aggression.<sup>94</sup>

Second, the French version of the U.N. Charter, which is equally authoritative, uses term *agression armee* (armed aggression).<sup>95</sup> This formulation would appear to allow a defensive response to a serious covert attack.

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defense argument); *International Lawlessness in Grenada*, 78 AM. J. INT'L L. 172 (1984) (signing, along with Richard Falk and seven other scholars, a paper stating in part that "[t]hroughout the 20<sup>th</sup> century, the U.S. Government has routinely concocted evanescent threats . . . as pretexts to justify armed interventions into sister American states.").

<sup>92</sup> See, e.g., Oscar Schacter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1634 (1984) (reading Article 51 to be limited to overt armed attack, but finding that the customary law right of self-defense was nonetheless undisturbed by adoption of the Charter).

<sup>93</sup> WHITEMAN, *supra* note 20, at 62 (quoting a Lebanese delegate addressing indirect aggression taken against his country by the United Arab Republic). See also Moore, *supra* note 91, at 85.

<sup>94</sup> Moore, *supra* note 91, at 83.

Third, the *travaux préparatoires* of the Charter indicate that the inclusion of Article 51 was not intended to abridge the traditional right of self-defense. Rather, Article 51's purpose was to accommodate regional security organizations within the Charter's scheme of centralized, global collective security.<sup>96</sup> It was added at the insistence of Latin American states who feared their right of collective defense under the Act of Chapultepec would be frustrated by vetoes cast in the United Nations Security Council. Furthermore, in the process of formulating Article 2(4), the drafting committee reported that "[t]he unilateral use of force or similar coercive measures is not authorized or admitted. The use of arms in legitimate self defense remains admitted and unimpaired."<sup>97</sup>

Fourth, the structure of sentence evidences that Article 51 was intended to reaffirm, not displace, the customary right. The first sentence is written in the negative, stating that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense . . . ." Thus, the drafters sought to reassure states that the Charter, an unprecedented document impinging on national sovereignty, would not impact or limit one particular right – the right to self-defense – in any way.

Fifth, there are sound policy reasons to conclude that Article 51 simply reaffirms the customary rule of international law with respect to individual and collective self-defense. The guiding principles of the United Nations as reflected in the U.N. Charter include the maintenance of peace and security,<sup>98</sup> self-determination,<sup>99</sup> territorial integrity,

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<sup>95</sup> *Id.* at 83. See U.N. CHARTER, art. 111 (stating that the Chinese, French, Russian, English, and Spanish texts are equally authentic). This principle of treaty interpretation was later codified in the Vienna Convention on the Law of Treaties, *supra* note 55, art. 33.

<sup>96</sup> MCDUGAL & FELICIANO, *supra* note 83, at 234-35.

<sup>97</sup> *Id.* at 235.

<sup>98</sup> U.N. CHARTER art. 1, para. 1.

<sup>99</sup> U.N. CHARTER art. 1, para. 2.

and political independence.<sup>100</sup> Clearly, covert or indirect attacks undermine these principles as effectively as a traditional armed attack. One commentator notes that to argue "that a state may not employ force to combat indirect aggression reveals a considerable lack of understanding of the purposes of the Charter. The drafters meant only to proscribe the unlawful use of force, not coercion in defense of such basic values as political independence or territorial integrity."<sup>101</sup> Any interpretation that prohibits the exercise of self-defense measures in response to secret or indirect armed attacks grants impunity to covert aggressors, a result the drafters of the U.N. Charter would not have sanctioned. Also, it is unreasonable to conclude that the signatory states in 1945 would have negotiated away a right that protected the most fundamental values of a state.

Thus, it is clear that the right of individual or collective self-defense, whether found in customary international law or in the language of Article 51 of the U.N. Charter, permits responses to covert as well as overt aggression. Self-defense, however, has two components: necessity and proportionality.<sup>102</sup> The first factual issue, then, is whether North Vietnam was engaged in acts of aggression triggering the right to respond with coercive force. Not all aggressive acts necessarily rise to this level. As Moore states, "the verbal tests of the *Caroline* case and Article 51 reflect a community interest in restricting conflict to those cases where fundamental values are seriously threatened by the initiating coercion."<sup>103</sup> Thus, "minor encroachments on sovereignty, political disputes, frontier incidents, the use of non-coercive modalities of interference, and generally aggression which does not threaten fundamental values, such as political and

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<sup>100</sup> U.N. CHARTER art. 2, para. 4.

<sup>101</sup> Moore, *supra* note 91, at 84-85, quoting ROGER H. HULL & JOHN C. NOVOGRAD, LAW AND VIETNAM 118,120 (1968).

<sup>102</sup> MCDUGAL & FELICIANO, *supra* note 83, at 217.

territorial integrity, may not be defended against by major resort to force against another entity.”<sup>104</sup> Whether the initiating coercion rises to the level that permits resorting to the use of responsive force is fact dependent. The initial aggression must be so intense that the target-state has a reasonable expectation that military reaction is necessary to protect its most fundamental values.<sup>105</sup>

In this case, the political stability of South Vietnam was seriously threatened by the North Vietnamese-directed aggression, especially assassinations and kidnappings, by the end of 1958.<sup>106</sup> From 1959 to 1961, North Vietnam infiltrated an estimated 10,700 men into South Vietnam.<sup>107</sup> Also, since the end of 1959, well-organized and equipped Viet Cong military units had been attacking South Vietnamese military targets.<sup>108</sup> These armed units had been formed as a result of the Fifteenth Conference of the Central Committee, which met in Hanoi in January 1959.<sup>109</sup> Consequently, there was a necessity for South Vietnam to resort to force.

Having determined that the right of self-defense was triggered, Chayes should have then determined what extent of military action was permissible under international law. In general, the use of responsive force must be proportionate to the threat.<sup>110</sup> Proportionality limits the response to “what is reasonably necessary promptly to secure the permissible objectives of self-defense.”<sup>111</sup> Proportionality does not mean matching

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<sup>103</sup> MOORE, *supra* note 8, at 367.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> I PENTAGON PAPERS, *supra* note 16, at 335.

<sup>107</sup> MOORE, *supra* note 8, at 371.

<sup>108</sup> I PENTAGON PAPERS, *supra* note 16, at 338.

<sup>109</sup> Guenter Lewy, *Evidence of Aggression from the North and the State Department “White Papers,”* in THE VIETNAM DEBATE, A FRESH LOOK AT THE ARGUMENTS, 89, 90-91 (John Norton Moore ed. 1990).

<sup>110</sup> Schacter, *supra* note 92, at 1637 (stating that acts done in self-defense must not exceed in manner or aim the necessity provoking them).

<sup>111</sup> MCDUGAL & FELICIANO, *supra* note 83, at 242.

the aggressor tit for tat. Rather, it means measuring the response against its permissive objectives.<sup>112</sup>

Here, the permissible objectives of South Vietnam would be protecting its territorial integrity, political independence, and right of self-determination in the face of sustained attacks. These attacks often originated from bases located in Laos or North Vietnam. The insurgent forces in South Vietnam were dependent on supply lines in North Vietnam and Laos. In fact, "[i]n January 1960 General Giap declared that 'the North has become a large rear echelon of our army. The North is the revolutionary base for the whole country.'"<sup>113</sup>

Measured against this threat, Chayes is right to imply that strategic targeting of North Vietnam would be permissible once the right of self-defense is triggered. The right of defense is a right of effective defense. Effective self-defense may require a counterattack against the source of the attack on a scale that would deter future attacks.<sup>114</sup> Schacter notes, "it does not seem unreasonable, as a rule, to allow a state to retaliate beyond the immediate area of attack, when that state has sufficient reason to expect a continuation of attacks (with substantial military weapons) from the same source."<sup>115</sup> In sum, while the response to unlawful aggression must be proportionate, it need not be anemic.

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<sup>112</sup> Moore, *supra* note 91, at 89.

<sup>113</sup> Lewy, *supra* note 109, at 91.

<sup>114</sup> Schacter, *supra* note 92, at 1638 (referring to U.S. response to North Vietnamese attacks on naval vessels in the Gulf of Tonkin).

<sup>115</sup> *Id.* Later, Schacter asserts with no explanation that proportionality requires an outside intervening state (whose intervention is lawful exercise of collective self-defense) not to introduce higher technology weapons than those used by the aggressor state. In fact, the U.S. initially avoided deploying sophisticated aircraft in part because of a belief that such aircraft would raise the level of violence and risk widening the war. MOMYER, *supra* note 17, at 10. It is now evident that U.S. restraint was not rewarded and such arbitrary lines, without reference to the factual context, are not useful.

Lastly, the legal advice should have reminded the decision-makers that the United States was required to report any measures it took after the fact to the U.N. Security Council in accordance with Article 51. Also, collective action was to be promptly terminated should the U.N. Security Council take effective measures to resolve the situation.

#### IV. Analysis of 1964 Legal Advice

The next major turning point in the Vietnam War came in 1964. American involvement had been gradually and silently deepening.<sup>116</sup> Since 1962, the U.S. had been involved in various "plausibly deniable" operations as part of the counter-insurgency effort. At the Honolulu conference in early June, General Taylor suppressed the views of his colleagues on the Joint Chiefs of Staff advocating massive military action against the North Vietnamese sanctuary.<sup>117</sup> Instead, the conference adopted McNamara's graduated pressure strategy. Relying on quantitative analysis rather than military expertise, McNamara assumed "that the limited application of force would compel the North Vietnamese to the negotiating table and exact from them a favorable diplomatic settlement. There was no need to pursue military victory because negotiations would achieve the same political objectives with only the threat of more severe military action."<sup>118</sup>

Thus, two months before the Gulf of Tonkin incident, the administration was planning on increasing overt U.S. military pressure on North Vietnam in order to

<sup>116</sup> MCMASTER, *supra* note 31, at 119.

<sup>117</sup> *Id.* at 100-01.

<sup>118</sup> *Id.* at 94.

"communicate" with Ho Chi Minh. Against this backdrop, the State Department Legal Advisor once again drafted a legal review for the Secretary of State and the President.<sup>119</sup>

Unlike the earlier Chayes memorandum, this document was focused entirely on the domestic legal bases for the use of force abroad. The first section dealt with deploying forces in advisory and noncombatant roles. Of course, the United States already had over 16,000 troops in South Vietnam filling positions of this type.<sup>120</sup> The memo affirms that this was lawful pursuant to section 503 of the Foreign Assistance Act of 1961. Furthermore, the memo cites the 1950 Agreement for Mutual Defense Assistance in Indo-China as support for non-combat activities.

The bulk of the legal analysis deals with the President's authority to send United States military personnel to Vietnam to engage in combat activities. Pre-dating the War Powers Resolution<sup>121</sup> by ten years, the memo deals primarily with the provisions of the U.S. Constitution.

The memo correctly cites to Article II, Section 2 of the Constitution as the basis for presidential authority to employ armed forces. That section states that "[t]he President shall be Commander in Chief of the Army and Navy of the United States . . . ."<sup>122</sup> The memo also refers indirectly to the executive power of the President found in Section 1 of Article II.<sup>123</sup> The memo alludes to a gray area between the powers of the executive and legislative branches in this area, but concludes that the drafters did not

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<sup>119</sup> Memorandum on Legal Basis for Sending American Forces to Viet-Nam, June 26, 1964 [hereinafter 1964 Memo] (on file with author); I FOREIGN RELATIONS OF THE UNITED STATES 1964-1968: VIETNAM 1964 532 (John P. Glennon et al. eds., 1992) [hereinafter VIETNAM 1964] (containing Secretary of State Dean Rusk's cover memorandum but not the legal memorandum).

<sup>120</sup> Additionally, many of those advisors were in fact engaged in combat activities. See *supra* notes 26-33 and accompanying text.

<sup>121</sup> Pub. L. No. 93-148, § 5, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1982)).

<sup>122</sup> U.S. CONST. art. II, § 2.



intend the enumerated Congressional powers to prejudice the right of the President to repel sudden attacks.<sup>124</sup>

The memorandum next turns to the historical record. In this regard, it notes that there was a long history of the President employing armed forces without congressional intervention. Many of those cases dealt only with "the general defense of the United States or the protection of some national interest or some concern of American foreign policy."<sup>125</sup>

After noting that the Supreme Court had not considered the issue, the memo addresses congressional interest. Here, the memo concludes that the general view of Congress is that the "President has both a right and a duty to take measures which he considers necessary for the defense of the United States."<sup>126</sup> The President is to take such measures unilaterally, however, only when the situation is "of such urgency as to brook no delay and to allow no time for seeking the approval of Congress."<sup>127</sup>

Finally, the memorandum concludes by stating that the existence of the Southeast Asia Treaty and its Protocol extending protection to South Vietnam was evidence of U.S. national security interest. The fact that this treaty received the advice and consent of the Senate conferred additional legitimacy to this contention. Interestingly, the memo does not recommend actually invoking the treaty. This would seem to stem from two bases. First, the legislative history of that treaty indicated that invoking the treaty to send U.S. forces into combat would require acting through Congress.<sup>128</sup> Second, the collective

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<sup>123</sup> "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1.

<sup>124</sup> 1964 Memo, *supra* note 119, at 2.

<sup>125</sup> *Id.* at 3.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 4.

defense provisions of the treaty were to be triggered by an "armed attack." The memo opined that it was "difficult to characterize North Vietnamese actions in South Viet-Nam as 'armed attack' within the meaning of the Southeast Asia Treaty and the U.N. Charter."<sup>129</sup>

I have some general observations on this memorandum. First, just as the Chayes memo ignored one-half of the picture, so does this one. One would expect that a legal memorandum going to the President from the Secretary of State and coordinated with the Department of Justice Office of Legal Counsel would address both the domestic and international legal bases for the use of force abroad. It doesn't. The only mention of the U.N. Charter is the flawed conclusion that North Vietnamese aggression to that point did not constitute an armed attack as contemplated in Article 51.<sup>130</sup> Second, the memorandum, including the Secretary of State's cover letter, fails to make any recommendations. This failure underscores the vagueness of the memo's contents. For example, the Constitution apparently grants the President the power to repel sudden attacks, but nowhere does the memorandum attempt to place this authority in the context of sending armed forces to Vietnam. Furthermore, the desirability or even requirement of seeking congressional approval is not marked with any precision.<sup>131</sup>

Regarding the constitutional analysis, the Legal Advisor got it about right. Without much elaboration, the memorandum states that the line between the executive and legislative power was not clearly delineated in the Constitution. In fact, the Constitution sets forth the legislative powers in limited terms, while the executive power

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<sup>129</sup> *Id.*

<sup>130</sup> See *supra* notes 88-101 and accompanying text.

<sup>131</sup> The President would, of course, eventually obtain Congressional authorization for his actions via the Gulf of Tonkin Resolution in August 1964.

is expressed more generally.<sup>132</sup> Article I, section 1 provides that "all legislative powers herein granted shall be vested in the Congress of the United States."<sup>133</sup> It then specifies certain national security related powers. They include the power to declare war, raise and support armies, provide and maintain a navy, and make rules for the government and regulation of the land and naval forces.<sup>134</sup>

With respect to the "declare war" clause, it is important to note that "declare war" was a term of art understood by the framers as meaning the initiation of offensive hostilities.<sup>135</sup> Also, it is not synonymous with "make war." The framers consciously chose to change Congress' power from the latter, which it enjoyed under the Articles of Confederation, to the former.<sup>136</sup> Furthermore, the power to declare war, as an enumerated exception to the general executive power, should be construed narrowly.<sup>137</sup> It is intended to be a veto or negative check on the presidential power to initiate an offensive war. To a large degree, this power is obsolete today. By ratifying the Kellogg-Briand Pact<sup>138</sup> and the U.N. Charter, the United States effectively gave up its sovereign right to wage aggressive war.<sup>139</sup>

On the other hand, Article II, section 1 vests *the* executive power in the President of the United States of America, and section 2 makes him the Commander-in-Chief. This clause vests in the President all powers executive in nature unless specifically lodged

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<sup>132</sup> Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 VA. J. INT'L L. 903, 929-30 (1994).

<sup>133</sup> U.S. CONST. art. I, § 1.

<sup>134</sup> U.S. CONST. art. I, § 2.

<sup>135</sup> Turner, *supra* note 132, at 906-07.

<sup>136</sup> *Id.* at 910.

<sup>137</sup> *Id.* at 948.

<sup>138</sup> General Treaty for the Renunciation of War As An Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

<sup>139</sup> Turner, *supra* note 132, at 915.

elsewhere in the Constitution.<sup>140</sup> Essentially, congressional powers in the foreign affairs arena were to be limited, while the President was to have expansive authority. The President needs no special authority to use force to defend against a military threat to the United States or to faithfully execute its laws or treaties.<sup>141</sup>

Consequently, although the memorandum is somewhat vague at points, its general thesis that the executive had been granted broad authority to send forces abroad in the nation's interest was correct.

The brief discussion of the SEATO Treaty<sup>142</sup> is somewhat problematic. Although mainly cited for the proposition that there had been a congressional determination of a vital national security interest in Vietnam, the memorandum seems to imply that the treaty would constitute a basis in international law for action if invoked. This is not the case, however. The treaty, like other collective defense agreements, does not provide an international legal basis *per se*. It is simply an agreement between the parties to act together in a certain way in the face of aggression. The actual international legal basis must still be ascertained elsewhere, such as a U.N. Security Council resolution authorizing an enforcement action or Article 51 and customary international law sanctioning collective self-defense.

On the other hand, the SEATO Treaty could form part of the domestic legal basis for the use of force. Treaties are part of the supreme law of the land,<sup>143</sup> and the President

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<sup>140</sup> *Id.* at 929-37.

<sup>141</sup> *Id.* at 914-15.

<sup>142</sup> Southeast Asia Collective Defense Treaty, Sept. 8, 1954, 6 U.S.T. 81.

<sup>143</sup> U.S. CONST. art. VI.

must "take Care that the Laws be faithfully executed . . . ." <sup>144</sup> Article IV of the SEATO

Treaty states:

Each Party recognizes that aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes. Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations. <sup>145</sup>

Thus, under Article IV of the SEATO Treaty, the United States had an obligation to "act to meet the common danger" in the event of an armed attack. Furthermore, the President, under the general grant of executive power in the Constitution, is responsible for fulfilling this duty. Therefore, if the President determined that the U.S. needed to deploy combat troops to meet this treaty obligation, he was entitled to do so. <sup>146</sup>

## V. Analysis of the 1965 Legal Advice

In March 1965, the United States began bombing targets in North Vietnam as part of Operation Rolling Thunder. In April of that year, the first ground combat troops waded ashore at Da Nang. On June 10<sup>th</sup>, the Attorney General, Nicholas deB. Katzenbach, advised the President as to whether additional congressional approval was necessary in light of proposed troop increases in South Vietnam. <sup>147</sup>

The Attorney General was responding to a specific request concerning the proposed increase of 30,000 to 40,000 ground troops in South Vietnam. These would be

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<sup>144</sup> U.S. CONST. art. II, § 3.

<sup>145</sup> Southeast Asia Collective Defense Treaty, Sept. 8, 1954, art. IV, 6 U.S.T. 81.

<sup>146</sup> Similarly, if the President made U.S. forces available to the Security Council under a U.N. Charter Article 43 agreement, he could do so without a declaration of war since such action would not amount to initiating an offensive war.

<sup>147</sup> VIETNAM 1965, *supra* note 4, at 751-54.

added to the approximately 50,000 soldiers already stationed there. With this additional force strength, the President also intended to expand the scope of the military mission from an advisory and area security role to offensive operations within South Vietnam.<sup>148</sup>

For much the same reason as that expressed in the 1964 memorandum discussed above, Katzenbach concluded that congressional approval was unnecessary. Specifically, the Attorney General advised the President that as the Commander-in-Chief and as the sole organ of the United States in the field of foreign relations, he was empowered to deploy and use the armed forces abroad.<sup>149</sup> Furthermore, he determined that the "declare war" clause was intended to apply to the use of force to conquer and subdue a foreign nation.<sup>150</sup>

Katzenbach further opined that although the President need not ask for congressional authorization, it was sometimes politically wise to do so. However, any such authorization is likely to limit the President's authority.<sup>151</sup> In this case, the President already had congressional authorization in the form of the Tonkin Gulf Resolution.<sup>152</sup> In Katzenbach's judgement, the proposed new measures were still well within the confines of that statute. Seemingly out of an abundance of caution, he notes that the proposed offensive actions were to be carried out by forces in one to two battalion strength. He does this because of the existence of some legislative history "to the effect that the congressional approval did not extend to involvement in large-scale land war in Asia. In this regard, however, there were repeated references to war in 'division strength.'"<sup>153</sup>

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<sup>148</sup> *Id.* at 752.

<sup>149</sup> *Id.* at 752.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 753.

<sup>152</sup> Pub. L. No. 93-148, § 5, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1982)).

<sup>153</sup> VIETNAM 1965, *supra* note 4, at 754.

Thus, he is able to advise the President that he would not violate any supposed congressional limitations.

While I agree with his conclusion, I have two principle objections with Katzenbach's memorandum. First, he displays too much lawyerly caution in noting that the Tonkin Gulf Resolution could, in the minds of some, impose some restrictions on presidential action. He need not have been quite so reticent. The legislative history of this statute points much more clearly to a finding that Congress wrote the President a veritable blank check to use military force in Vietnam.<sup>154</sup>

A more serious objection concerns his reasoning about the "declare war" clause. Katzenbach stresses that the commitment was limited in size, and that the actions would be confined to South Vietnam and "would be directed against forces claiming to be insurgents rather than the forces of a foreign nation."<sup>155</sup> Thus, the U.S. would neither be engaging in all-out war nor taking any act of war against a foreign nation. Based on these premises, he finds that the congressional power to declare war was not implicated. Again, Katzenbach was too constraining on the executive power and too generous with the legislative power. As noted above, the congressional authority to declare war is a negative on the President's power.<sup>156</sup> Article II, Section 1 of the Constitution granted to the President all of the powers that were executive in nature, with limited exceptions. Those exceptions, like the authority to declare war, are to be construed narrowly. Consequently, the President did not need congressional authorization to send 50,000 troops to South Vietnam only because they expected to confine their actions to that country. He had the authority to do so under the executive power clause. Congress could

<sup>154</sup> Turner, *supra* note 132, at 960-61.

<sup>155</sup> VIETNAM 1965, *supra* note 4, at 753.

not exercise their Article I, section 2 legislative veto because the President was not taking the country from a state of peace to one of aggressive war.

## VI. Conclusion

The Vietnam War effectively began for the United States in 1961 and ended with our withdrawal and abandonment of South Vietnam in 1973. The war has left a deep scar on the American psyche. In an ideal world, things would have gone differently right from the beginning.

Ideally, the President would have identified the political objective in Vietnam, for example, to keep South Vietnam from falling into communist camp.<sup>157</sup> His top-level advisors would have given him a range of options. The Joint Chiefs of Staff, in particular, would have prepared a cogent and unified plan based on sound military principles. In general, we know that the United States needed first and foremost to isolate the battlefield. This would have required strategic bombing in North Vietnam to destroy supplies and war-supporting targets, thereby reducing the infiltration flow from north to south.<sup>158</sup> It would also have required the mining of Haiphong Harbor, where Hanoi received over eighty-five percent of her war material. Finally, it would have required the physical interdiction of Ho Chi Minh trail in Laos. Before making his

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<sup>156</sup> See *supra* notes 135-39 and accompanying text.

<sup>157</sup> President Johnson identified the U.S. objective in 1966 as follows. "Our purpose in Vietnam is to prevent the success of aggression. It is not conquest; it is not empire; it is not foreign bases, it is not domination; it is to prevent the forceful conquest of South Vietnam by North Vietnam." MOMYER, *supra* note 17, at 172 (quoting a speech given by President Johnson on February 23, 1966).

<sup>158</sup> "The [air] campaign, to be effective, had to begin with attacks on the head of the system in North Vietnam. At that point the lines of communications were most vulnerable to an attack, and there the supplies and repair and support facilities for the entire logistics system were located. . . . As the transportation system threaded its way south . . . we found fewer vulnerable segments that could be blocked for any length of time." MOMYER, *supra* note 17, at 174.



decision, the President would have the benefit of sound legal advice. Of course, that is not what happened.

In reality, the political objective was, at best, ambiguous. Vietnam was a microcosm of the Cold War and United States containment policy dictated that it commit resources to defend South Vietnam. Had the President attempted to walk away from Vietnam, he would have been accused of appeasement and "losing" Vietnam. On the other hand, senior administration officials were hesitant to entangle the U.S. in another large-scale war on the Asian landmass so soon after Korea. Consequently, the United States effectively resolved to avoid defeat rather than attempt victory.<sup>159</sup>

Thus, there was a desire to "control" the war, and Secretary of Defense McNamara professed to be able to do just that with gradual responses to provocation and sophisticated management techniques. Furthermore, under President Kennedy, the Joint Chiefs lost their direct access to the president, and thus any real influence on decision making.<sup>160</sup> Even had they had that access, they were often bitterly divided by service parochialism. All of this played nicely into McNamara's hands. Similarly, the tepid, minimalist legal advice provided by Abram Chayes reinforced the adoption of McNamara's flawed strategy.

National-level decision-makers require accurate and comprehensive legal advice prior to employing U.S. armed forces abroad.<sup>161</sup> In 1961, the State Department Legal

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<sup>159</sup> VIETNAM 1962, *supra* note 28, at 301 (memo stating that "there will be neither total victory nor defeat but rather the development of an uneasy fluid stalemate").

<sup>160</sup> MCMASTER, *supra* note 31, at 5. Furthermore, Secretary McNamara, in learning all the wrong lessons from the Cuban Missile Crisis, was "[c]onvinced that military advice based on the objective of achieving victory was outmoded, even dangerous . . ." *Id.* at 41.

<sup>161</sup> As it turns out, the Chayes memo was five days too late. On November 11, 1961, President Kennedy decided to commit U.S. advisers to South Vietnam in excess of the number permitted in the Geneva Accords. MCMASTER, *supra* note 31, at 37. This fact reinforces the theory that the Secretary of State, like the Secretary of Defense, was merely giving the President the advice he wanted to hear.

Advisor was the best placed official to render this advice before President Kennedy chose to deepen U.S. military involvement in Indochina. The general formula for this advice is fairly simple. First, is there a domestic legal basis for employing U.S. forces abroad? In 1961, this was primarily a question of constitutional law. Second, is there a basis in international law for the proposed action? In this regard, there are four broad categories of permissible use of force: a U.N. sanctioned enforcement action, a regional enforcement action, actions falling under the Article 2(4) threshold, and individual or collective self-defense pursuant to Article 51 of the U.N. Charter and customary international law. Measuring the Chayes memorandum against this simple framework, the Legal Advisor failed to fulfill his responsibility.

Concededly, sound legal analysis, especially in the national security arena, is dependent on availability of accurate facts. Thus, Chayes' legal advice was tainted by misunderstandings about the extent of the external threat to South Vietnam. Nonetheless, even Chayes seemed to recognize that South Vietnam was being victimized by actions directed by North Vietnam. North Vietnam exercised "restraint," however, by cloaking its aggression as an insurgency and delaying a conventional cross-border attack. Because Chayes was unable to conceive of such "indirect aggression" as triggering the right to self-defense, North Vietnam was, in his judgement, free to undermine the state of South Vietnam with relative impunity.

It is difficult to assess the actual impact of Chayes memorandum on the National Command Authority. Some historians feel that President Kennedy resolved to limit U.S. involvement to "non-combat" roles (FARM GATE and other advisor activities

notwithstanding) and then withdraw completely after being re-elected.<sup>162</sup> While this may be wishful thinking on the part of Kennedy supporters (and Johnson/Nixon haters), the Chayes memorandum would have provided legal "top cover" for such a withdrawal and reinforced administration impulses to sharply limit the use of military force.

The perceived limitations of the Geneva Accords did impact USAF operations somewhat. USAF proposals to modify the T-37 jet trainer into a fighter-bomber for use in Vietnam were rejected because it would have appeared to violate the Geneva Accords.<sup>163</sup> Jets were finally introduced in early 1965 in response to a rapidly deteriorating military situation.

Also, it is probably fair to conclude that this legal advice reinforced Secretary McNamara's desire to manage the conflict without taking decisive military action. With hindsight, it is clear that such a strategy was doomed to failure. As General Momyer writes, "[w]e prefer to make smaller decisions, win battles, and hope that the enemy will lose heart. . . . But that way leads to a series of Khe Sanhs and eventually in a free society to war-weariness and dissent."<sup>164</sup>

The 1964 and 1965 memoranda are less objectionable. Both correctly conclude that the executive power to deploy troops abroad in the national interest supported

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<sup>162</sup> RALPH G. MARTIN, *A HERO FOR OUR TIME: AN INTIMATE STORY OF THE KENNEDY YEARS* 499 (1983); Allegedly, Kennedy was persuaded in part by General Douglas A. MacArthur. *Id.* at 494 ("The old general was saying, as forcefully as he could, 'Never ever, ever put American soldiers on the mainland of Asia.'"); *see also* WILLIAM MANCHESTER, *REMEMBERING KENNEDY, ONE BRIEF SHINING MOMENT* 224 (1983) (recounting an exchange between President Kennedy and Senator Mike Mansfield). Kennedy had started to withdraw 1000 troops at the end of 1963 and announced that the rest of the troops would be home by 1965. Interestingly, future Chairman of the Joint Chiefs of Staff General Colin Powell was transferred back to the United States from Vietnam one month early in November 1961 as part of the 1000 troops. COLIN POWELL, *MY AMERICAN JOURNEY* 100 (1995).

<sup>163</sup> MOMYER, *supra* note 17, at 250. Also, the Administration rejected sending T-33 jets in 1963 for the same reason. III FOREIGN RELATIONS OF THE UNITED STATES 1961-1963: VIETNAM 1963 197 (John P. Glennon et al. eds., 1991) (Vietnam Working Group memo stating that "[g]iving the Vietnamese jets would be a flat and obvious violation of the Geneva Accords").

<sup>164</sup> MOMYER, *supra* note 17, at 339.

presidential plans for Vietnam. Nonetheless, the 1965 memorandum in particular was too limiting, hinting at the necessity to confine the war to South Vietnam. Taken together, all three of these memoranda arguably served to reinforce Administration impulses to delay making tough decisions about Vietnam, to sharply limit the use of military force, and to use gradual measures intended to communicate with the enemy rather than attempt to defeat him.

If it is clearer now twenty-five years after U.S. forces withdrew, it was nonetheless apparent even in 1961 that one could not fight a such a "sub-limited" war and win. Though muted, there were military voices recommending stronger action. General Momyer writes, "[b]y mid-1962, many other senior airmen and I were of the opinion that air strikes against the North Vietnamese homeland would be necessary if the war in South Vietnam were to be ended."<sup>165</sup> Instead, the United States began a war of attrition in South Vietnam, largely ignoring North Vietnam, Laos, Cambodia, lines of communication, supply routes, and logistics depots. In short, we ignored all of the principles of war. It was a political failure that cost this nation over 58,000 lives and doomed South Vietnam to totalitarian domination. It was also a dereliction of duty by the nation's top legal advisors.

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<sup>165</sup> MOMYER, *supra* note 17, at 12.

gon;<sup>3</sup> I don't know why.) We believe that it will then be up to the ICC to establish that North Viet Nam as well as we are violating the Accords. . . .

In my opinion, when we announce that we are no longer bound by the Accords the ICC will be pretty well washed up in Viet Nam. To hope that following such an event it will become a much more effective instrument for the sole purpose of establishing North Viet Nam as an aggressor seems to me quite optimistic. Perhaps the Indians . . . have indicated that they will take the ICC more seriously, but did he commit himself to such action in the context of a decision by the U.S. to state that it is no longer bound by the Accords?

. . . How much of value can we hope to get out of the ICC? At best, we might get a judgment by the Indian and Canadian members substantiating some of the Vietnamese charges against North Viet Nam. It would be an important advance which would help us establish the basis for current and future U.S. actions, . . . .

Robert H. Johnson<sup>4</sup>

<sup>3</sup> See Document 257 and footnote 2 thereto.

<sup>4</sup> Printed from a copy that bears this typed signature.

261. Memorandum From the Legal Adviser (Chayes) to the Secretary of State<sup>1</sup>

*Washington, November 16, 1961.*

SUBJECT

Report of Taylor Mission on Viet-Nam<sup>2</sup>

I have reviewed General Taylor's report on Viet-Nam and the proposed action documents stemming from it (draft instructions to Embassy Saigon and draft letter from President Diem to President

<sup>1</sup> Source: Department of State, Central Files, 751K.00/11-1661. Top Secret. Drafted by Chayes and sent to the Secretary through S/S and Johnson (U). Initialed by both Chayes and Johnson. Attached to the source text is the following note of November 16 from Chayes to the Secretary: "This preparation of this memorandum and its attachments was undertaken before yesterday's NSC decisions. I believe that the analysis and observations given below will continue to be relevant, both in the carrying out of those decisions and in deliberations on further steps in the future."

<sup>2</sup> Document 210.

Kennedy).<sup>3</sup> Attached is a memorandum (Tab A) which examines the proposed actions from the legal point of view. This memorandum concludes that, apart from any measures involving military operations deep into North Viet-Nam, the proposed actions do not present legal problems incapable of being dealt with and surmounted. The memorandum suggests some changes that ought to be made in the planning for these actions if it is decided to proceed with the general course plotted out by the Taylor Mission. These changes would be designed to improve the defensibility of our actions and to avoid consequences that would be prejudicial to the interests of South Viet-Nam and the United States. There is also (Tab B)<sup>4</sup> a suggested revision of certain paragraphs of the draft letter from President Diem.

Thus, apart from the possibility of long-range attacks into North Viet-Nam, the issues in deciding on our future course of action are essentially political. But we must remember that the extent to which resort to direct self-help, rather than to the procedures and institutions for peaceful settlement of international problems, has an important bearing on the prospects and effectiveness of the rule of law in the world. Because of my deep concern with these matters, I should like to give you my thoughts on the less technically legal issues in relation to Viet-Nam.

General Taylor's analysis of the situation in South Viet-Nam shows that the basic causes of deterioration and threatened collapse of non-Communist authority are not military but political. But the remedies proposed would undertake to cope with the situation principally by military and semi-military means. The central feature of the course would be the initial introduction of substantial numbers of United States troops to help in pacifying the country. It is said that to embark on this course we must be prepared to escalate, if necessary, to the dimensions of a Korea-type conflict. In assessing the prospects for this course the long history of attempts to prop up unpopular governments through the use of foreign military forces is powerfully discouraging. The French experience in this very area, as well as our own efforts since 1955, reveal the essential inadequacy of the sort of program now proposed. The drawbacks of such intervention in Viet-Nam now would be compounded, not relieved, by the United States penetration and assumption of co-responsibility at all levels of the Vietnamese Government suggested in the Taylor Report.

<sup>3</sup> Drafts of telegram 619 to Saigon (see footnote 2, Document 257) and the letter quoted in Document 257.

<sup>4</sup> Not printed.

In my view, a more promising course of action would be to seek to internationalize the problem with a view to a negotiated settlement or a United Nations solution. I believe we should take advantage of Ambassador Harriman's presence at Geneva and his working relations with Pushkin to sound out the Soviets on the possibility of a negotiated settlement in Viet-Nam. Mr. Harriman has discussed this problem with me and has shown me the memorandum which he has given you on this subject.<sup>5</sup> I concur generally in his proposals.

If Ambassador Harriman's efforts should produce no affirmative result we should also consider the advisability of taking the Viet-Nam problem to the United Nations. We would particularly seek to establish in the United Nations the facts of foreign intervention in Viet-Nam, and to enlist the United Nations' assistance in protecting the independence and integrity of Viet-Nam. Attached at Tab C<sup>6</sup> is a memorandum outlining a course of action in the United Nations.

You have often said with reference to the Berlin question that, in view of the magnitude of the stakes, we owe it to ourselves, to the American people and to our allies and associates in the free world, to exhaust the possibilities of a negotiated or peaceful settlement which will be consistent with our interests and responsibilities. The alternative to such a settlement is no less grave in Southeast Asia.

[Tab A]

**Memorandum Prepared in the Office of the Legal Adviser<sup>7</sup>**

General Taylor's Report on Viet-Nam recommends among other things that additional United States military personnel and equipment be introduced into South Viet-Nam to provide increased airlift, for expanded intelligence operations, for naval surveillance activities, and to expedite training and equipping of South Vietnamese military and civil guard elements. The question of whether additional United States forces should be introduced even to the extent of a Korea-type operation and whether we may eventually have to attack the source of guerilla aggression in North Viet-Nam is also discussed.

It has been suggested in connection with the Taylor Report that because South Viet-Nam did not sign the Geneva Accords, it is not

<sup>5</sup> Apparently a reference to Document 239.

<sup>6</sup> Not printed.

<sup>7</sup> Top Secret. No drafting or clearance information is given on the source text.

bound by them. In any case, it is said, North Vietnamese violations of the Accords have made them inoperative, and the Accords can be ignored by South Viet-Nam in taking actions to meet the present danger. In addition, it has been suggested that the right of self-defense under the United Nations Charter can be invoked to justify actions now contemplated by the United States in South Viet-Nam.

The legal implications of these proposed actions and suggested rationale are discussed below. As with all legal principles, the application of the particular principles of law discussed herein depends upon the facts of the case. One of the steps necessary to the successful development and projection of our case in the international forum is a much fuller development than presently exists of the facts concerning external interference in Viet-Nam, such as those disclosed in the Jordan Report. We must remain continuously alert to ways in which facts that bring the legal principles into operation—such as the facts of external interference—can be gathered from reliable sources and persuasively presented.

#### *1954 Geneva Accords*

This office has never accepted the argument that South Viet-Nam is not bound by the Geneva Accords of 1954 because it did not sign them. While the representative of South Viet-Nam did not sign the agreement and in fact protested against certain provisions in it, it was signed by the French on behalf of the French Union Forces, and since the State of Viet-Nam was part of the French Union it would seem to be bound by the French signature. The agreement relating to Laos was similarly signed on behalf of the French Union Forces without a Laotian signature, yet we have always considered the Kingdom of Laos bound by the Accords. South Viet-Nam can also be considered bound by the Accords as a successor state to France. In any event the argument to the contrary leads to very undesirable consequences, for if the South Vietnamese are not parties to the Accords and not bound by them, they would seem to have no legal basis for demanding compliance by the Viet Minh with obligations under the Accords such as respect for the demarcation line and the cease-fire.

Unlike Viet-Nam, the United States did not become a party to the Accords. It issued a unilateral declaration stating that it would refrain from the threat or use of force to disturb them and that it would view any renewal of aggression in violation of the Accords with grave concern and as seriously threatening international peace and security.

The Geneva Accords prohibit the introduction into Viet-Nam of foreign troop reinforcements, additional military personnel and in-



creased amounts of war material. In the absence of adequate legal justification, introduction of United States military personnel and equipment as envisaged in the Taylor Report would therefore, in our view, be a violation of the Accords by South Viet-Nam. Such action would not be inconsistent with the unilateral declaration of the United States, since it would not constitute the threat or use of force to upset the Accords. Nevertheless, again in the absence of adequate legal justification, the United States would be aiding and abetting violations by South Viet-Nam.

Justifications for the actions presently contemplated may be found in general principles of international law governing treaties. Under these principles, a material breach of a treaty by one party entitles the other either to suspend the operation of the entire agreement or at least to withhold compliance with an equivalent, corresponding or related provision until resumption of observance by the other party. The Viet Minh have violated the Geneva Accords by directing, assisting and engaging in active hostilities in South Viet-Nam and presumably by illegal introduction into North Viet-Nam of military personnel and war materials.

Justification of suspension of certain parts of the Geneva Accords would gain force in the present context from the fact that actions contemplated by the Government of Viet-Nam which might be said to contravene the Accords can be related to the requirements of legitimate self-defense necessitated by the breaches of the other party.

Thus, under the applicable principles, we would have the option of suspending the agreement in toto or of withholding compliance with appropriate provisions. In our judgment, the United States and South Viet-Nam should choose the latter course, since we will wish to assert the continuing force of a number of obligations which the Viet-Minh have undertaken under the Accords. The demarcation line itself between North and South Viet-Nam is established by the Accords, as is the requirement for the general cessation of hostilities. It should be recognized, however, that the adoption of this course imposes upon us some obligation to keep our response appropriately related to the infractions of the other side.

Though we believe that the introduction of additional military forces and equipment into South Viet-Nam for the purposes described at the beginning of this memorandum would be justified at law, there is no doubt that the Communists will claim, and with a certain plausibility, that South Viet-Nam has violated the Accords, aided and abetted by the United States. To the extent that the contemplated measures can be cast in the form of assistance and training to police and constabulary forces rather than the introduc-

tion and training of regular troops, the persuasive force of these complaints will be lessened.

*General Intervention*

Assuming that the Geneva Accords are not a barrier to actions contemplated in the Taylor Report, the question arises as to whether there are any other legal obstacles to such actions under general international law or the United Nations Charter.

International law permits the United States to introduce its forces into South Viet-Nam at the invitation of the Government of Viet-Nam to assist that Government in quelling insurgent activities having substantial external support, inspiration or direction. There is nothing in the United Nations Charter that prohibits such action.

In 1958, at the invitation of the President of Lebanon, and in circumstances of alleged indirect aggression against the Government of Lebanon by outside forces or governments, United States troops were sent to Lebanon. President Eisenhower explained that this action was taken in part "to encourage the Lebanese Government in defense of Lebanese sovereignty and integrity."

As in the Lebanese situation, however, we should be prepared to defend United States action in Viet-Nam in an international forum such as the United Nations; whether the question is brought there at our own or someone else's initiative.

*Retaliatory Attacks*

As to the problem of attacking the source of guerilla aggression in North Viet-Nam there are two currently relevant categories of fact situations:

1) The first category relates to operations undertaken against bases near the border in North Viet-Nam and Laos which are being used as a sanctuary and for supply purposes by the Viet Cong. It would seem justifiable under international law principles relating to hot pursuit to follow the enemy across the border and attempt to destroy his bases of operations adjacent to the border. Such operations would have to be appropriately related to the act provoking them, proportionate in their effects and limited to action necessary to obtain relief.

2) The second category consists of direct attacks against Hanoi and similar strategic centers deep inside North Viet-Nam. In the absence of overt aggression by means of armed attack against South Viet-Nam, such action would go beyond permissible self-defense under general international law and would be contrary to the United Nations Charter.

The right of individual or collective self-defense referred to in Article 51 of the Charter can be invoked only in the event of an armed attack. The term "armed attack" as used in the Charter is

generally understood as a direct external attack upon one country by the armed forces of another such as the German invasion of Poland in 1939 or the North Korean attack on South Korea in 1950. Armed attack is a form of aggression. "Aggression" is a broader concept, covering a range of actions by which one state may threaten the territorial integrity or political independence of another. This difference is recognized in international law generally, in the United Nations Charter and in our mutual defense treaties. In the latter the term "armed attack" has been expressly or implicitly limited to exclude indirect aggression.

An essential element in determining whether an action constitutes an "armed attack" is the factor of time. An armed attack is an action which occurs swiftly, requiring *immediate* measures to ward it off. The "armed attack" envisaged under Article 51 of the Charter is an attack which requires immediate measures of self-defense, measures which cannot await the action of the United Nations but which must be undertaken at once. By the same token "armed attack" under such agreements as the North Atlantic Treaty, the Southeast Asia Treaty, and the Rio Treaty implies a situation in which a response is required before the normal consultative procedures can be availed of.

Article 2(4) of the Charter prohibits any use of force by a United Nations member in its international relations which is inconsistent with the purposes of the United Nations. Article 51 of the Charter recognizes the right of individual or collective use of force in self-defense against armed attack without waiting for steps to be taken by any United Nations organ. In cases of aggression that fall short of armed attack, however, it would not be consistent with the purposes of the United Nations for the United States as a UN member to proceed to the use of armed force to defeat acts which it considers aggressive. In such cases, it would be incumbent upon a UN member to bring the matter first to the attention of the United Nations organization for its consideration and judgment.

VII. TAYLOR'S FIRST MONTH AS AMBASSADOR; THE  
INCREASE IN U.S. ADVISORY FORCES IN VIETNAM,  
JUNE 25-JULY 31

226. Memorandum From the Secretary of State to the President<sup>1</sup>

*Washington, June 29, 1964*

SUBJECT

Legal Basis for Sending American Forces to Viet-Nam

The enclosed memorandum<sup>2</sup> is submitted in response to your request of June 22 for a consideration of the legal basis for sending American forces to Viet-Nam.<sup>3</sup> The conclusions of the memorandum may be summarized as follows:

1. The sending of American military personnel to serve in an advisory, non-combatant role rests on specific authority contained in the Foreign Assistance Act of 1961 and on a Mutual Defense Assistance Agreement with Viet-Nam.

2. The assignment of United States military personnel to duty in Viet-Nam involving participation in combat rests on the constitutional powers of the President as Commander-in-Chief of the armed forces, as Chief Executive, and in precedents in history for the use of these powers to send American forces abroad, including various situations involving their participation in hostilities. In the case of Viet-Nam, the President's action is additionally supported by the fact that South Viet-Nam has been designated to receive protection under Article IV of the Southeast Asia Collective Defense Treaty; both the Treaty and the Protocol covering Viet-Nam received the advice and consent of the Senate.

Dean Rusk<sup>4</sup>

<sup>1</sup> Source: Department of State, Central Files, DEF 19 US-VIET S. Secret. Drafted by Leonard C. Meeker and Carl F. Salans of L, cleared by Norb Schlie of the Department of Justice and by William Bundy. Also published in *Declassified Documents*, 1983, 002145

<sup>2</sup> Not printed here; published *ibid*.

<sup>3</sup> Apparently the request was oral. (Memorandum from Meeker to Rusk, June 26 Department of State, Central Files, DEF 19 US-VIET S)

<sup>4</sup> Printed from a copy that bears this typed signature.

*James On 10*

THE SECRETARY OF STATE  
WASHINGTON

June 29, 1964

DECLASSIFIED

State Dept. letter 11/22/78  
By JK DATE 11/10/79

MEMORANDUM FOR THE PRESIDENT

Subject: Legal Basis for Sending  
American Forces to Viet-Nam

The enclosed memorandum is submitted in response to your request of June 22 for a consideration of the legal basis for sending American forces to Viet-Nam. The conclusions of the memorandum may be summarized as follows:

1. The sending of American military personnel to serve in an advisory, noncombatant role rests on specific authority contained in the Foreign Assistance Act of 1961 and on a Mutual Defense Assistance Agreement with Viet-Nam.

2. The assignment of United States military personnel to duty in Viet-Nam involving participation in combat rests on the constitutional powers of the President as Commander-in-Chief of the armed forces, as Chief Executive, and in the field of foreign affairs. There have been numerous precedents in history for the use of these powers to send American forces abroad, including various situations involving their participation in hostilities. In the case of Viet-Nam, the President's action is additionally supported by the fact that South Viet-Nam has been designated to receive protection under Article IV of the Southeast Asia Collective Defense Treaty; both the Treaty and the Protocol covering Viet-Nam received the advice and consent of the Senate.

*Dean Rusk*  
Dean Rusk

Enclosure:

Memorandum

COPY

June 26, 1954.

DECLASSIFIED

State Dept. Letter 11/22/78  
NARS, Date 4/10/79

MEMORANDUM ON LEGAL BASIS  
FOR SENDING AMERICAN FORCES  
TO VIET-NAM

1. Advisory and noncombatant activities of American Forces in Viet-Nam are authorized by Section 503 of the Foreign Assistance Act of 1961 (22 U.S.C. (Supp. IV) 2311). That provision authorizes the President to furnish military assistance abroad to any friendly country through, inter alia, "assigning or detaching members of the Armed Forces of the United States... to perform duties of a noncombatant nature, including those related to training or advice." Furthermore, the United States and Viet-Nam are parties to an agreement for mutual defense assistance in Indo-China dated December 23, 1950 (TIAS 2440, 3 UST 2756), which was concluded pursuant to Public Law 329, 81st Congress (63 Stat. 714, 22 USC (1952 ed.) 1571-1604). This Agreement provides for the furnishing by the United States to Viet-Nam of military assistance in the form of equipment, material and services. Article IV, paragraph 2 of the Agreement states that "To facilitate operations under this Agreement, each Government agrees... To receive within its territory such personnel of the United States of America as may be required for the purposes of this Agreement..." ①

2. The President's authority to send United States military personnel to Viet-Nam on assignments that include participation in combat derives from Article II, Section 2 of the Constitution, ② which provides that "The President shall be Commander-in-Chief of the Army and Navy of the United States." This power of the President is complemented by his special responsibilities under the Constitution in the field of foreign affairs (U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)) and by his position as Chief Executive with the duty to see that the laws are faithfully executed.

The line between Executive and Legislative power is not marked out with precision in the Constitution. For example, Article I, Section 8, provides that Congress "shall have power... To declare war, ...To raise and support armies, ... To provide and maintain a navy". However, the debate at the Federal Convention in 1787 when the Constitution was being drafted makes clear that the powers of Congress are without prejudice to the right of the President to take action on his own "to repel sudden attacks".

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Since the Constitution was adopted there have been at least 125 instances in which the President, without Congressional authorization and in the absence of a declaration of war, has ordered the armed forces to take action or maintain positions abroad. These instances range from the war against the Barbary pirates in Jefferson's time to the sending of troops to Lebanon in 1958 by President Eisenhower. In a number of cases the President has acted in accordance with the general opinion of Congress or has sought Congressional ratification later. Many other cases, however, have not been referred to Congress at all. (4)

While the most numerous class of these instances involved the protection of American property or American citizens in foreign lands, a number of them--such as the intervention in Texas in 1845 and in Mexico in 1917, the intervention in Panama in 1903-04, the dispatch of troops to Lebanon in 1958--were not concerned with the interests of individual citizens but with the general defense of the United States or the protection of some national interest or some concern of American foreign policy.

A memorandum detailing these historical events and discussing the question of the President's constitutional authority, prepared in the Department of State at the outset of the Korean conflict in 1950, is attached (Tab A). A further presentation of the views of the Executive Branch on this subject, published in 1951 as a Joint Committee Print of the Senate Committees on Foreign Relations and Armed Services, is also attached (Tab B).

Supreme Court decisions have not determined the extent of the President's authority to deploy and use United States armed forces abroad in the absence of express authorization from the Congress. The question has been the subject of Congressional debate at different times, and the power of the President to take action on his own responsibility has been generally supported. It has been supported on the theory that the President has both a right and a duty to take measures which he considers necessary for the defense of the United States. The view has sometimes been stated that the commitment of United States forces to combat may be made by the President on his own responsibility only when he judges the situation to be one of such urgency as to brook no delay and to allow no time for seeking the approval of Congress. Presidential decision that such an emergency exists is one which other branches of the Government are unlikely to try to overturn. There is, of course, a difference between (a) the participation in combat of individual U. S. military personnel attached to the armed forces of another country, and (b) the commitment of organized United States forces to combat. Congressional concern

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has been particularly with the latter, because of the clearer possibility it carries of involving the United States in large-scale hostilities.

If any question were raised as to the importance of Viet-Nam to the defense of the United States, this would be answered not only by the President's own evaluation, but by the fact that a Protocol to the Southeast Asia Treaty extends its protection to the Republic of Viet-Nam. Both the Treaty and Protocol received the advice and consent of the Senate. They represent a decision of the United States Government, in the constitutional form of a treaty, that the defense and security of Viet-Nam are necessary to the United States. Although the Treaty and Protocol have not been invoked with respect to the situation in Viet-Nam (since it is difficult to characterize North Vietnamese actions in South Viet-Nam as "armed attack" within the meaning of the Southeast Asia Treaty and the U. N. Charter), the existence of the Treaty and Protocol lends support to the President's action in sending American forces to Viet-Nam. The legislative history of the Treaty and Protocol indicates, however, an understanding that if the treaty were formally invoked as a basis for United States military action or if organized United States forces were committed to combat on a substantial scale, the President would act through Congress if it were in session, and if not in session would call Congress, "unless the emergency were so great that prompt action was necessary to save a vital interest of the United States."

This memorandum has been reviewed in the Department of Justice and approved by Mr. Schlei, Assistant Attorney General in charge of the Office of Legal Counsel.



and, most importantly, to place major stress on a program of political, social, and economic action in South Vietnam.

12. *Objectives:* To prevent a collapse in South Vietnamese morale and military capabilities during the next few months; to accomplish certain improvements basic to the creation of a viable non-Communist state in the South, and, meanwhile, to keep open the preceding options.

13. *Consequences:* Though Option D also has its drawbacks, it has the following relative merits:

a. Heightened US pressure on North Vietnam would increase the difficulty of supporting the Viet Cong and make Hanoi pay an ever heavier price for continuing that support. Furthermore, it would demonstrate our willingness to accept heightened political risks.

b. It would involve the deployment of substantial US ground forces in the South—a prime requirement for the immediate future. Further, it would not convey to the GVN/ARVN the notion that the US was taking over the war.

c. It would give the US time and opportunity to increase the civic action, political, paramilitary, local defense, and administrative improvements which are needed to create a viable non-Communist state in the South.

d. The net effect of the foregoing would have some chance of persuading the DRV that time was no longer running their way and that they should move to negotiate.

e. The US would avoid the negative reactions abroad and at home which would be produced by all-out bombings of the DRV and ever-increasing US troop commitments.

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345. Memorandum From Attorney General Katzenbach to President Johnson<sup>1</sup>

Washington, June 10, 1965.

RE

Whether further Congressional approval is necessary or desirable in connection with proposed deployment and use of troops in South Vietnam

You have asked for my views as to whether further Congressional approval should be sought in connection with the proposed deployment

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<sup>1</sup> Source: Johnson Library, National Security File, Country File, Vietnam, 7B Legality Considerations. No classification marking. The date is handwritten on the source text.

and use of troops in South Vietnam. What is contemplated, as I understand it, is (1) an increase of 30 to 40,000 in the number of troops stationed in South Vietnam, now approximately 50,000 and (2) the use of such troops, in one to two-battalion strength, for attacks on concentrations of Viet Cong forces.

The use of troops being contemplated would involve some departure from the functions generally served by U.S. ground forces previously, i.e., as "advisers" accompanying South Vietnamese forces, or as guards engaged in protecting U.S. installations and forces against attack. The operations being contemplated would involve attacks on "targets of opportunity" located as much as 150 miles distant from U.S. installations. The objective would be to have the U.S. forces act as a light, mobile reserve to South Vietnamese ground forces, able to strike quickly at the request of such forces when heavy concentrations of Viet Cong forces are detected. All of the activities being contemplated would be undertaken with the consent of the government of South Vietnam and would be limited to the territory of that country.

It is my view that, as a matter of law, further Congressional approval at this time is not necessary.

I

Under the Constitution the President has authority, as Commander-in-Chief of the armed forces (Article II, section 2), and as the sole organ of the United States in the field of foreign relations (*United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320 (1936)), to deploy and use the armed forces abroad. This authority has generally been broadly interpreted, and the armed forces have been used without legislative authority on scores of occasions including those involving "acts of war."

In the absence of some action by Congress, the only legal limitation on the power of the President to commit the armed forces arises by implication from Article I, section 8 of the Constitution, under which only Congress is authorized to "declare war." I believe it is a fair, although not uncontroversial, summary of nearly two centuries of history to say that the power to "declare war" is the power to confer substantially unlimited authority to use the armed forces to conquer and, if necessary, subdue a foreign nation. Unless such unlimited authority is exercised by the President, his legal position in using the armed forces is sustainable. It has been argued that the President may, without Congressional approval, take only urgent defensive measures, or that he may take only minor police measures that are not likely to commit the United States to full scale war. However, the action taken by President Truman in Korea, which is not widely regarded as having been illegal, shows how extensive the powers of the President may be. The same illustration also

shows how inextricably tied together the legal and policy issues involved in such a situation necessarily are.

On many occasions the President has asked for Congressional approval of his action. When Congress responds to such a request the strictly legal effects of its action, if short of a declaration of war, are likely to be to limit rather than extend his authority. In the absence of Congressional action, the President's legal position is sustainable so long as it is consistent with the Constitution, i.e., so long as his action does not amount to an infringement of the power of Congress to declare all-out war. There is authority, however, indicating that in areas where both Executive and Congressional powers are operative, the Executive must observe the limits of any Congressional authorization that may be enacted even though, in the absence of any authorization, his Executive powers under the Constitution would clearly go beyond the Congressional grant. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637, 661-662 (Justices Jackson and Clark); *Little v. Barreme*, 2 Cranch 170, 177-178 (Chief Justice Marshall). The Congressional authorization obviously can serve indispensable political purposes and it may serve to allay the legal doubts of narrow constructionists. These advantages must be weighed, however, against the legal limitations that may be effectively imposed by a Congressional authorization and its legislative history.

It is my view that as President you would have the authority, in the absence of any action by Congress, to use the armed forces in the manner now proposed. The commitment involved is certainly far less than all-out war, and the likelihood of involving the United States in all-out war as a result of the proposed moves, assuming that to be a relevant consideration, is relatively slight in view of the limitations on both the size of the force committed and the nature of the mission. It should be noted also that none of the acts proposed is an act of war against a foreign nation; that is to say, the activity involved would take place solely within the territory of South Vietnam and at the invitation of its government, and would be directed against forces claiming to be insurgents rather than the forces of a foreign nation.

I also believe it is clear that you have the legal authority to take the proposed measures under the terms and legislative history of the Vietnam Resolution of August 10, 1964 (P.L. 88-408, 78 Stat. 384),<sup>2</sup> and the appropriation of May 7, 1965 (P.L. 89-18, 79 Stat. 109). It was repeatedly

<sup>2</sup> This Resolution provides:

"The Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.

*Continued*

stated in connection with those enactments that the military measures previously taken, including the bombing of targets in North Vietnam, were being approved by Congress. In my judgment the steps now proposed, being confined to South Vietnamese territory, are of a kind with the steps already approved. There is some legislative history to the effect that the Congressional approval did *not* extend to involvement in large-scale land war in Asia. In this regard, however, there were repeated references to war in "division strength." These limitations—if they exist—are not infringed by the limited measures now contemplated.

I therefore conclude that, from a legal standpoint, there is no need to seek further Congressional approval at this time.

Nicholas deB Katzenbach

"Sec. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in Southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

"Sec. 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress." [Footnote in the source text.]

346. Memorandum From the Joint Chiefs of Staff to Secretary of Defense McNamara<sup>1</sup>

JCSM-457-65

Washington, June 11, 1965.

SUBJECT

US/Allied Troop Deployments to South Vietnam (SVN)

1. The Joint Chiefs of Staff have reviewed US/Allied force requirements in SVN in the light of recent developments in Southeast Asia and the Republic of Vietnam (RVN). Findings and recommendations resulting from this review are set forth in the following paragraphs.

<sup>1</sup> Source: Johnson Library, National Security File, Country File, Vietnam, JCS Memos, Vol. I. Top Secret.

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Ronald R. Ratton  
The Long Slow Struggle

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